DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-551
Title: Ken L. Salazar, Secretary of the Interior, et al., Petitioners
v.
Ramah Navajo Chapter, et al.
Docketed: October 31, 2011
Linked with 11A408
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (08-2262)
Decision Date: May 9, 2011
Rehearing Denied: August 1, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 20 2011	Application (11A408) to extend the time to file a petition for a writ of certiorari from October 30, 2011 to November 13, 2011, submitted to Justice Sotomayor.
Oct 21 2011	Application (11A408) granted by Justice Sotomayor extending the time to file until November 14, 2011.
Oct 31 2011	Petition for a writ of certiorari filed. (Response due November 30, 2011)
Nov 17 2011	Order extending time to file response to petition to and including January 6, 2011.
Dec 9 2011	Brief of respondents Ramah Navajo Chapter, et al. in opposition filed. (Distributed)
Dec 14 2011	DISTRIBUTED for Conference of January 6, 2012.
Dec 15 2011	Reply of petitioners Ken L. Salazar, Secretary of the Interior, et al filed. (Distributed)
Jan 6 2012	Petition GRANTED.
Feb 3 2012	SET FOR ARGUMENT ON Tuesday, April 18, 2012
Feb 16 2012	Record received from U.S.C.A. for 10th Circuit. (1 box)
Feb 17 2012	Joint appendix filed.
Feb 17 2012	Brief of petitioners Ken L. Salazar, Secretary of the Interior, et al filed.
Feb 22 2012	Record received from U.S.D.C. for District of New Meixco. (7 boxes)
Mar 7 2012	CIRCULATED.
Mar 19 2012	Brief of respondents Ramah Navajo Chapter, et al. filed. (Distributed)
Mar 26 2012	Brief amici curiae of National Congress of American Indians, et al. filed. (Distributed)
Mar 26 2012	Brief amicus curiae of Arctic Slope Native Association, Ltd. filed. (Distributed)
Mar 26 2012	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Apr 11 2012	Reply of petitioners Ken L. Salazar, Secretary of the Interior, et al filed. (Distributed)
Apr 18 2012	Argued. For petitioners: Mark R. Freeman, Assistant to the Solicitor General,

	Department of Justice, Washington, D. C. For respondent: Carter G. Phillips, Washington, D. C.
Jun 18 2012	Adjudged to be AFFIRMED Sotomayor, J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion in which Ginsburg, Breyer, and Alito, JJ., joined.
Jul 20 2012	JUDGMENT ISSUED.
Jul 26 2012	Record returned to U.S.D.C. for District of Mew Mexico.
Jul 26 2012	Record returned to U.S.C.A for 10th Circuit.

PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

KENNETH L. SALAZAR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the government is required to pay all of the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, where Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap.

PARTIES TO THE PROCEEDING

Petitioners are Kenneth L. Salazar, Secretary of the Interior; Larry Echo Hawk, Assistant Secretary—Indian Affairs, Department of the Interior; Mary L. Kendall, Acting Inspector General, Department of the Interior; and the United States of America.

Respondents are Ramah Navajo Chapter, the Oglala Sioux Tribe, and the Pueblo of Zuni, as representatives of a certified class of Indian tribes and tribal organizations that have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

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In the Supreme Court of the United States

No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Interior, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-87a) is reported at 644 F.3d 1054. The opinion of the district court (App., *infra*, 90a-107a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2011. A petition for rehearing was denied on August 1, 2011 (App., *infra*, 108a-109a). On October 21, 2011, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including

November 14, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

Pertinent provisions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, the Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*, and the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, are reproduced in the appendix to this petition (App., *infra*, 110a-131a).

STATEMENT

1. a. Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. 450a(b). The Act "direct[s]" the Secretary of the Interior or the Secretary of Health and Human Services, as appropriate, to enter into a "self-determination contract" at the "request of any Indian tribe" to permit a tribal organization to administer federal programs that the Secretary would otherwise provide directly for the benefit of Indians.[1] 25 U.S.C. 450f(a). "Self-determination contracts with Indian tribes are not discretionary," S. Rep. No. 274, 100th

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[1] The Act defines the term "tribal organization" to include, *inter alia*, the governing body of an Indian tribe or any organization controlled or chartered by the tribe. See 25 U.S.C. 450b(*l*).

Cong., 1st Sess. 3 (1987), and the Secretary must accept a tribe's request for a contract except in specified circumstances, see 25 U.S.C. 450f(a)(2). The Act thus generally permits a tribe, at its request, to step into the shoes of a federal agency and administer federally funded services.

The basic parameters of an ISDA contract are set out in the Act. See generally 25 U.S.C. 450*l*(c) (model agreement). As originally enacted in 1975, the ISDA required the Secretary to provide the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" during the fiscal year in question. 25 U.S.C. 450j-1(a)(1). This amount is sometimes called the "secretarial amount." In 1988, Congress amended the ISDA to require that, in addition to the secretarial amount, the Secretary must also provide an amount for the tribe's reasonable "contract support costs," which are costs that a tribe must incur to operate a federal program but that the Secretary would not incur. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)). Such costs may include certain direct costs of administering a program, such as costs of complying with special audit and reporting requirements, and indirect costs, such as an allocable share of general overhead. See 25 U.S.C. 450j-1(a)(3)(A). Because this amount may vary from year to year, the sums to be provided are negotiated on an annual basis and memorialized in annual funding agreements. See 25 U.S.C. 450j(c)(2); 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (f)(2)).

b. Federal funding under ISDA contracts, like funding for other federal programs, is contingent upon the availability of appropriations. Congress made that con-

tingency explicit in at least four places in the Act. First, the ISDA declares generally that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c). Second, Congress directed that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard terms. 25 U.S.C. 450*l*(a)(1). Those terms specify that a lack of sufficient appropriations may excuse performance by either party. See 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (c)(3)). Third, the Act requires the Secretary to submit annual reports to Congress describing, *inter alia*, "any deficiency in funds needed to provide required contract support costs to all contractors" and "any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes" under the Act. 25 U.S.C. 450j-1(c).

Finally, in a provision entitled "Reductions and increases in amount of funds provided," Congress stipulated that:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. 450j-1(b). The Act thus contemplates the possibility that the available appropriations may be insufficient to fund the requests of all tribal contractors fully or equally.

c. In *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), this Court clarified that appropriations are not "unavailable" to satisfy contracts under the

ISDA simply because the Secretary has obligated for other purposes the funds in an unrestricted appropriation. In that case, the Indian Health Service (IHS), an agency of the Department of Health and Human Services, paid only a portion of the contract support costs that it had promised to two tribes in ISDA contracts for fiscal years 1994 through 1997. The tribes brought suit under the ISDA, see 25 U.S.C. 450m-1(a) and (d), and the Contract Disputes Act of 1978, 41 U.S.C. 7101 *et seq.* (formerly codified at 41 U.S.C. 601 *et seq.*), to recover the balance. The government argued, *inter alia*, that it had no further obligation to the tribes because the Secretary had obligated the remaining funds from the unrestricted appropriation for other tribes and for other important administrative purposes. *Cherokee*, 543 U.S. at 641-642.

This Court rejected that argument and held that the Secretary could properly be held liable for the promised but unpaid costs. See *Cherokee*, 543 U.S. at 636-647. Noting that the IHS did "not deny that it promised to pay the relevant contract support costs," *id.* at 636, this Court agreed with the tribes that the government "normally cannot back out" of a contract on the basis of insufficient appropriations "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue." *Id.* at 637. The appropriations for the fiscal years in question, the Court emphasized, "contained no relevant statutory restriction," *ibid.*, and the agency had available "*other* unrestricted funds, small in amount but sufficient to pay the claims at issue" for the particular tribes before the Court, *id.* at 641. Consequently, the ISDA's proviso that all payments to tribes are "subject to the availability of appropriations," 25 U.S.C. 450j-1(b), could not excuse the government's

breach: "Since Congress appropriated adequate unrestricted funds here," that contingency was irrelevant. 543 U.S. at 643.

2. This case presents an important question not resolved in *Cherokee*: whether the government must pay all of a tribal organization's contract support costs under the ISDA where Congress *has* imposed an explicit statutory cap on the appropriations authorized to pay such costs. The Secretary, through the Bureau of Indian Affairs (BIA) and other offices, provides a broad array of basic educational, economic, and social services to more than 1.9 million Native Americans and Alaska Natives. Nearly 40% of the BIA's annual funding for such services is administered directly by tribes and tribal organizations under ISDA self-determination contracts. All but 12 of the more than 550 federally recognized Indian tribes have at least one ISDA funding agreement with the Secretary.

The Secretary funds ISDA self-determination contracts, like other agency programs, from the lump-sum appropriation provided by Congress each year for the Department of the Interior. Until fiscal year (FY) 1994, Congress followed the same approach for the BIA that it did for the IHS, as described in *Cherokee*: while legislative committee reports discussed specific sums for ISDA contract support costs, see, *e.g.*, H.R. Rep. No. 901, 102d Cong., 2d Sess. 40 (1992), the appropriation acts themselves contained no relevant restrictions, see, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 102-381, 106 Stat. 1374.

For FY 1994, however, Congress imposed an express statutory cap on the appropriations available for the Secretary to pay contract support costs under the ISDA. Of a total appropriation in that year of approximately

$1.5 billion for the BIA, Congress specified that "*not to exceed $91,223,000* of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts" under the ISDA. Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, Tit. I, 107 Stat. 1390-1391 (emphasis added). The Conference Report accompanying the bill explained:

> The managers remain very concerned about the continued growth in contract support costs, and caution that it is unlikely that large increases for this activity will be available in future years' budgets. It is also a concern that significant increases in contract support [costs] will make future increases in tribal programs difficult to achieve.

H.R. Conf. Rep. No. 299, 103d Cong., 1st Sess. 28 (1993).

Congress has included a similar "not to exceed" cap for contract support costs in every annual appropriation for Interior since FY 1994.[2] See App., *infra*, 8a. It is undisputed that these statutory caps have restricted the

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[2] Subsequent appropriations acts have used the phrase "contract support costs" rather than "indirect costs." See Pub. L. No. 103-332, Tit. I, 108 Stat. 2511 (FY 1995); Pub. L. No. 104-134, 110 Stat. 1321-170 (FY 1996); Pub. L. No. 104–208, 110 Stat. 3009-192 (FY 1997); Pub. L. No. 105-83, Tit. I, 111 Stat. 1554 (FY 1998); Pub. L. No. 105-277, 112 Stat. 2681–245 (FY 1999); Pub. L. No. 106–113, 113 Stat. 1501A–148 (FY 2000); Pub. L. No. 106–291, Tit. I, 114 Stat. 934 (FY 2001); Pub. L. No. 107-63, 115 Stat. 430 (FY 2002); Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 231 (FY 2003); Pub. L. No. 108-108, Tit. I, 117 Stat. 1256-1257 (FY 2004); Pub. L. No. 108-447, 118 Stat. 3055 (FY 2005); Pub. L. No. 109-54, Tit. I, 119 Stat. 513-514 (FY 2006); Pub. L. No. 110-5, 121 Stat. 8-9, 27 (FY 2007) (continuing resolution); Pub. L. No. 110-161, Div. F, Tit. I, 121 Stat. 2110 (FY 2008); Pub. L. No. 111-8, 123 Stat. 713-714 (FY 2009); Pub. L. No. 111-88, 123 Stat. 2916 (FY 2010); Pub. L. No. 112-10, Div. B, Tit. VII, 125 Stat. 151 (FY 2011).

available funding at a level "well below the sum total" that would be required for the BIA to satisfy all tribes' requests.[3] *Id.* at 2a; see *id.* at 98a (noting facts not disputed by the parties). Instead, each year the BIA has distributed the available funding among tribal contractors on a "uniform, pro-rata basis," *id.* at 9a, according to plans published annually in the Federal Register. *Ibid.*; see, *e.g.*, *Distribution of Fiscal Year 1994 Contract Support Funds*, 58 Fed. Reg. 68,694 (Dec. 28, 1993).[4] In fiscal years 1994 through 2004, for example, tribal organizations contracting with the BIA were paid between 77% and 93% of their claimed contract support costs. See App., *infra*, 10a.

3. Respondent Ramah Navajo Chapter entered into multiple ISDA self-determination contracts with the BIA in the 1980s for the administration of federally funded law enforcement, water rights, and other programs. See *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1458 (10th Cir. 1997). Respondent originally filed this suit against the Secretary in 1990, on behalf of all BIA tribal contractors under the ISDA, to challenge the methodology that Interior's Office of the Inspector General used to set indirect cost rates. *Id.* at 1459; see

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[3] Since FY 1998, Congress has imposed similar statutory caps on contract support cost funding for IHS programs as well. See generally *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) (holding that the government is not liable for contract support costs above the statutory cap), petition for cert. pending, No. 11-83 (filed July 18, 2011).

[4] In 2006, in consultation with tribes, the BIA adopted a new national policy for the equitable distribution of funding for contract support costs, eliminating the need for annual Federal Register notices. See U.S. Dep't of the Interior, Bureau of Indian Affairs, National Policy Memorandum, Contract Support Cost, NPM-SELFD-1 (May 8, 2006), http://www.bia.gov/idc/groups/public/documents/text/idc-000691.pdf.

1:90-cv-00957 Docket entry No. 96 (D.N.M. Oct. 1, 1993) (class certification order).[5] In 1999, however, the district court granted respondents leave to amend their complaint to add a new claim for the alleged "underpayment" of contract support costs due to insufficient appropriations. *Id.* No. 347 (Sept. 30, 1999); see C.A. App. 149-151.[6] The parties cross-moved for summary judgment, and the matter was stayed pending the outcome of the *Cherokee* litigation. See App., *infra*, 13a-14a.

Following this Court's decision in *Cherokee*, the district court granted summary judgment for the government. App., *infra*, 90a-107a. Noting that the D.C. and Federal Circuits had already rejected tribal demands for contract support costs in excess of the express statutory caps on the funds available to the BIA to pay such costs, see *id.* at 98a-101a (discussing *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000) (*Oglala Sioux*), and *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)), the district court held that the "ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs in amounts in excess of capped contract support cost appropriations." *Id.* at 106a. The court explained that "Congress has the authority to determine the amount of appropriated funds the agency may obli-

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[5] The parties eventually settled respondents' claims concerning the indirect-cost rate formula, App., *infra*, 13a, and those claims are not at issue here.

[6] The district court also granted the motion of respondent Oglala Sioux Tribe to intervene as a class representative. Docket entry No. 347 (Sept. 30, 1999); see App., *infra*, 13a; C.A. App. 152-156 (Oglala complaint). The district court subsequently granted respondent Pueblo of Zuni leave to intervene as well. Docket entry No. 633 (Mar. 27, 2002).

gate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are 'subject to the availability of appropriations,' and by placing caps in the BIA's appropriation statutes." *Ibid.*

4. A divided panel of the court of appeals reversed. App., *infra*, 1a-87a. The court acknowledged that the phrase "subject to the availability of appropriations" could be interpreted in the manner the government urged and the district court held, under which the total amount of funding for contract support costs available for all tribal contractors was subject to the statutory cap. *Id.* at 16a. But the court nevertheless held that the government could be required to pay *all* of the contract support costs requested by *every* tribal contractor—even though that total amount would exceed the statutory cap—because Congress appropriated sufficient funds to satisfy the demands of any *single* contractor considered in isolation. *Id.* at 29a-30a; see *id.* at 34a ("[T]he insufficiency of a multi-contract appropriation to pay all contracts does not relieve the government of liability if the appropriation is sufficient to cover an individual contract."). The court found no "meaningful distinction" between this case and *Cherokee*, in which there was no appropriations cap, because in both cases the funds "were similarly insufficient to cover all objects for which the appropriation was available." *Id.* at 29a n.8.

Nor, in the court's view, did the Appropriations Clause of the Constitution or the Anti-Deficiency Act, 31 U.S.C. 1341, warrant a different result. App., *infra*, 43a-47a. While the appropriations caps would prevent the Secretary himself from disbursing more than the appropriated sums, the court explained, tribal contractors could simply "recover[] from the Judgment Fund" any

unpaid balance. *Id.* at 45a. Although the court recognized that "Congress likely did not intend" for contractors to avoid the statutory cap by seeking any excess from the Judgment Fund, it reasoned that "we must consider the legal effect of Congress's intentional acts, and those acts compel [this] result. Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an ongoing breach of the ISDA's promise." *Ibid.*

In so concluding, the court of appeals expressly disagreed with the contrary holding of the Federal Circuit in *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (2010), petition for cert. pending, No. 11-83 (filed July 18, 2011) (*Arctic Slope*). See App., *infra*, 34a (recognizing that *Arctic Slope* addressed "the same issue we confront"). The court further acknowledged that its decision was in conflict with the Federal Circuit's earlier decision in *Oglala Sioux*, *supra*, as well as the D.C. Circuit's decision in *Ramah Navajo School Board*, *supra*. See App., *infra*, 37a n.12.

Judge Hartz dissented from the decision below (App., *infra*, 47a-87a), objecting that the majority had "render[ed] futile the spending cap imposed by Congress." *Id.* at 47a. There was no authority, the dissent maintained, for requiring the government to make payments in excess of a mandatory appropriations limit imposed by Congress: "If such payments are not barred by the Constitution's Appropriations Clause, then the Anti-Deficiency Act should do the trick." *Id.* at 60a. Nor, the dissent continued, was the majority's result required by this Court's decision in *Cherokee*, because "what the Secretary sought *discretion* to do in *Cherokee*"—to allocate among tribal contractors an appropriated sum that was too small to cover the contract sup-

port costs requested by all contractors—"is *compelled* here" by the appropriations cap. *Id.* at 80a. The dissent would have "adopt[ed] the more natural interpretation of the statutory scheme, which * * * has been adopted in three other circuit opinions," including in "a thoughtful opinion by the court most conversant with federal contract law." *Id.* at 75a (citing the Federal Circuit's decision in *Arctic Slope*, *supra*), 78a.

REASONS FOR GRANTING THE PETITION

In this nationwide class action, the Tenth Circuit ruled that the government's liability for contract support costs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, is not bounded by the explicit statutory caps imposed by Congress on the annual appropriations authorized to pay such costs. That decision, which squarely conflicts with decisions of the Federal and D.C. Circuits, warrants this Court's review. Congress expressly reserved in the ISDA its constitutionally rooted authority to control the expenditure of funds from the Treasury in any fiscal year, "[n]otwithstanding any other provision" in the Act. 25 U.S.C. 450j-1(b). And in every fiscal year since 1994, Congress has exercised that expressly reserved authority, imposing statutory caps on the funds available for the Secretary to pay contract support costs at levels insufficient to satisfy all of respondents' requests. It is Congress's prerogative under the Appropriations Clause to impose such limits, and the Tenth Circuit erred in concluding that the government may be held liable for failing to pay sums that Congress has not authorized to be paid.

The Tenth Circuit's decision rests on the fundamentally mistaken notion that Congress, through the exer-

cise of its expressly reserved appropriations power, "breach[ed]" a statutory "guarantee[]" to tribes regarding contract support cost funding. App., *infra*, 45a. Tribally administered federal programs are not uniquely immune from the appropriations process. Congress's refusal for more than 15 years to write a blank check for ISDA contract support costs does not reflect a "breach" of any legal duty, but rather rests on a congressional judgment that the important federal policies served by underwriting such costs do not justify the unlimited disbursement of public funds at the expense of other priorities for the public welfare, including other programs benefitting Indians and Indian tribes. It is difficult to posit a judgment more firmly committed to Congress, as confirmed in the Appropriations Clause, see U.S. Const. Art. I, § 9, Cl. 7, and the Tenth Circuit had no warrant to set it aside. The accumulated tribal demands for unfunded contract support costs are already estimated to exceed $1 billion, and the problem grows worse with each federal budget cycle. This Court's intervention is necessary to correct the Tenth Circuit's erroneous interpretation of the ISDA and resolve this recurring problem of nationwide importance.

A. The Courts of Appeals Are Divided Over Congress's Authority To Limit The Expenditure Of Public Funds Under The ISDA

As the Tenth Circuit itself acknowledged, see App., *infra*, 34a, 37a n.12, the decision below directly conflicts with prior decisions of the D.C. and Federal Circuits, both of which have held that the government is not liable for ISDA contract support costs in excess of a statutory appropriations cap. See *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), petition for

cert. pending, No. 11-83 (filed July 18, 2011); *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). Until the Tenth Circuit's decision below, no court of appeals had refused to give effect to Congress's express assertion of control over the expenditure of public funds under the ISDA.

In *Ramah Navajo School Board*, the plaintiff tribal organizations challenged the Secretary's plan for allocating funding for ISDA contract support costs among tribal contractors in the face of a statutory appropriations cap in FY 1995. Although the D.C. Circuit panel divided on the question whether the Secretary's preferred method for distributing the available funds was subject to judicial review at all, the panel unanimously agreed that the government had no obligation to pay contract support costs beyond the statutory appropriations limit. As the court explained, "if the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds." 87 F.3d at 1345; see also *id.* at 1353 (Silberman, J., dissenting) (Congress "unequivocally stated that any tribes' legal entitlement to funds * * * was dependent on Congress making full appropriations" (emphasis omitted)).

Subsequently, in *Oglala Sioux*, *supra*, a tribal contractor under the ISDA brought suit against the Secretary claiming, like respondents here, an entitlement to "full" funding of its contract support costs, notwithstanding statutory appropriations limits. 194 F.3d at 1376. The Interior Board of Contract Appeals agreed with the contractor, but the Federal Circuit reversed, explaining: "the ISDA explicitly makes funding of ISDA contract indirect costs subject to the availability of ap-

propriations," and "Interior had no choice but to comply with the statute." *Ibid.* The language of 25 U.S.C. 450j-1(b), the court explained, is "clear and unambiguous; any funds provided under an ISDA contract are 'subject to the availability of appropriations.'" 194 F.3d at 1378. This "unequivocal statutory language prevents [a tribal contractor] from asserting that it was entitled to full funding as a matter of right." *Id.* at 1380. To hold that a tribal contractor may recover its "full" costs notwithstanding an express appropriations cap, the court concluded, would permit "the general intent underlying the ISDA to trump the express language of the statute" and would "render the subject-to-appropriations language of [Section] 450j-1(b) meaningless." *Id.* at 1378.

Most recently, in *Arctic Slope*, the Federal Circuit reaffirmed its view in the wake of this Court's decision in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005). The plaintiff in *Arctic Slope* entered into an ISDA self-determination contract with the Indian Health Service for the operation of a hospital in Alaska. The agency paid the tribal organization all of the contract support costs specifically promised in the annual funding agreements, but the organization nonetheless brought suit on the theory that the ISDA guaranteed additional funding of tribal contract support costs. 629 F.3d at 1300-1301. The Civilian Board of Contract Appeals rejected that claim, and the Federal Circuit affirmed. *Id.* at 1298, 1306. "In stark contrast to *Cherokee*," the court explained, "here there is a statutory cap on funding for contract support costs." *Id.* at 1301. The court reasoned that Congress's explicit statement in the ISDA that the provision of funds under a self-determination contract is subject to the availability of appropriations, "coupled with the 'not to exceed' language [in the appropriation acts,] limits

the Secretary's obligation to the tribes to the appropriated amount. The Secretary is obligated to pay no more than the statute appropriates." *Id.* at 1304. To accept the contractor's argument, the court concluded, would "effectively defeat the statutory cap." *Ibid.*

These decisions squarely conflict with the decision below, which rejected the views of the Federal Circuit on "the same issue." App., *infra*, 34a; see *id.* 34a-38a (discussing *Arctic Slope*). Moreover, because the decision below encompasses a nationwide class of all tribes and tribal organizations that have entered into ISDA contracts with the Secretary, see Docket entry No. 96, the likelihood of further legal developments in the courts of appeals is substantially diminished. This Court's review is warranted.

B. The Tenth Circuit's Decision Depends On The Mistaken Premise That The Appropriations Caps Constituted A "Breach" By Congress Of A Legal Duty To Tribal Contractors

The Tenth Circuit declared that the government is liable for the contract support costs requested by every tribal contractor, notwithstanding the appropriations caps, because "Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an on-going breach of the ISDA's promise." App., *infra*, 45a. That mismatched combination of statutory and contractual concepts does not provide a coherent basis for requiring the government to disburse public funds in excess of express statutory caps imposed by Congress.

1. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9,

Cl. 7. This Court has explained that the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM* v. *Richmond*, 496 U.S. 414, 427-428 (1990). The authority of Executive officials to administer the laws enacted by Congress is accordingly "limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425; see *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851).

In this case, Congress has expressly imposed such a "valid reservation"—a cap on the availability of appropriated funds for ISDA contract support costs—in every appropriation for the Department of the Interior since fiscal year 1994. As respondents do not dispute, in the parlance of federal appropriations law, the phrase "not to exceed" in these appropriations acts denotes Congress's intent to designate a maximum amount of funding available for the specified purpose. See 2 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 6-32 (3d ed. 2006); see also 64 Comp. Gen. 263, 264 (1985) ("not to exceed" is "susceptible of but one meaning"); *Arctic Slope*, 629 F.3d at 1301. And as Congress surely understood, "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM* v. *Richmond*, 496 U.S. at 430 (citing the Anti-Deficiency Act, 31 U.S.C. 1341, 1350).

Congress has thus imposed a firm ceiling on the amount of money that may be drawn from the Treasury for ISDA contract support costs each year for more than

15 years. See note 2, *supra*. It is undisputed that all of that money has long since been spent. See App., *infra*, 98a (district court's finding, as an undisputed fact, that "[i]n every fiscal year since 1994, BIA has distributed to tribal contractors the full amount of [contract support cost] funding appropriated for that purpose"). Unlike in *Cherokee*, therefore, there are no "unrestricted funds * * * sufficient to pay the claims at issue." 543 U.S. at 641. Nor has the government allocated elsewhere funds that would otherwise be available to respondents. Cf. *ibid.* While Congress in *Cherokee* "unambiguously provided unrestricted lump-sum appropriations," *id.* at 646-647, here Congress has expressly capped the appropriations available to the Secretary to meet respondents' demands. The BIA is "without power to make a contract binding the Government to pay more than the amount appropriated." *Sutton* v. *United States*, 256 U.S. 575, 579 (1921).

The Tenth Circuit concluded that neither the Appropriations Clause nor the Anti-Deficiency Act was implicated by its decision because the Judgment Fund is available to pay tribal requests in excess of the appropriations caps. App., *infra*, 43a-47a. That notion is untenable. The Judgment Fund is not a back-up source of agency appropriations. Nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury. As this Court explained in *OPM* v. *Richmond*, *supra*, "[t]he general appropriation for payment of judgments * * * does not create an all-purpose fund for judicial disbursement." 496 U.S. at 432. The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interest and costs" when "payment is not otherwise provided for." 31 U.S.C. 1304(a).

Here, the appropriations "provided for" the payment of respondents' ISDA contract support costs were those specifically provided in the annual appropriations for the Department of the Interior. The restrictions that Congress imposed on those sums may not be circumvented by seeking additional amounts from the Judgment Fund. By virtue of the statutory caps on the availability of appropriations for contract support costs, the United States is not liable for any costs in excess of those caps. And because there is no liability, there is no basis for a judgment against the United States that could be paid out of the Judgment Fund.

2. Against this background, the court of appeals identified no plausible theory on which the government may be held liable under the ISDA for failing to pay amounts that Congress has forbidden to be paid. The court of appeals suggested at points (*e.g.*, App., *infra*, 2a, 4a-8a, 45a-46a) that tribes' purported entitlement to "full funding" of contract support costs irrespective of the appropriations caps springs from the ISDA itself, and at other points that such an entitlement flows from principles of contract law (*e.g.*, *id.* at 21a-34a). Neither theory has merit. The ISDA does not confer on tribal contractors an unqualified "guarantee[]" (*id.* at 45a) of full funding for contract support costs, especially in the face of express limitations imposed in subsequent Acts of Congress—*i.e.*, the annual appropriations acts. Nor did Congress or the BIA "breach" any "promise" (*ibid.*) when Congress exercised its constitutional authority to control federal spending.

a. As originally enacted, the ISDA required the Secretary to provide only the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" in question during the fiscal year.

25 U.S.C. 450j-1(a)(1). In 1988, Congress amended the ISDA to require that, in addition to that sum, the Secretary must also provide an amount for the tribal organization's reasonable "contract support costs." Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)). That provision does not, even on its face, create an unqualified right to "full" federal funding of contract support costs: "*an amount for* the [contractor's] reasonable costs," 25 U.S.C. 450j-1(a)(2) (emphasis added), is not naturally read to mean "*all* reasonable costs."[7] And in any event, the ISDA as a whole clearly does not "guarantee[]" (App., *infra*, 45a) to a tribal contractor any particular level of federal funding. The Act specifically contemplates that actual funding will be contingent on subsequent appropriations laws, and thus on any restrictions contained in those appropriations laws. Indeed, as noted above (see pp. 3-4, *supra*), Congress made clear in at least four places in the Act that it intended to exercise complete control over the disbursement of funds from the Treasury for federal programs administered by tribes under the ISDA, just

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[7] The court of appeals also relied on 25 U.S.C. 450j-1(g) for its belief that "Congress has mandated that all self-determination contracts provide full funding of [contract support costs]." App., *infra*, 2a. But that provision merely provides that, when an ISDA contract is approved, the Secretary "shall add to the contract the full amount of funds to which the contractor is entitled *under subsection (a) of this section*," 25 U.S.C. 450j-1(g) (emphasis added)—that is, the secretarial amount, 25 U.S.C. 450j-1(a)(1), plus "an amount for" the contractor's reasonable contract support costs, 25 U.S.C. 450j-1(a)(2). The Act nowhere guarantees that every dollar requested by a tribal organization in contract support costs will be paid, let alone that such an entitlement exists irrespective of appropriations. See 25 U.S.C. 450j(c), 450j-1(b).

as it would if the same programs were administered by the Secretary directly.

First, the ISDA declares generally that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c). Second, Congress stipulated that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard terms. 25 U.S.C. 450*l*(a)(1). Those terms specify that a lack of sufficient appropriations may excuse performance by *either* party: the Secretary's obligation to provide the agreed sums is "[s]ubject to the availability of appropriations," and the contractor's obligation to "administer the programs, services, functions, and activities identified in th[e] Contract" is likewise "[s]ubject to the availability of appropriated funds." 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (c)(3)). Third, the Act requires the Secretary to submit annual reports to Congress containing, *inter alia*, an accounting of "any deficiency in funds needed to provide required contract support costs to all contractors," 25 U.S.C. 450j-1(c), a provision that would be wholly superfluous if, as the Tenth Circuit believed, Congress had "mandated that all self-determination contracts provide full funding" of contract support costs. App., *infra*, 2a.

Finally, in the same 1988 amendments that added the ISDA's provision concerning contract support costs, Congress simultaneously enacted the Act's most explicit reservation of Congress's appropriations authority:

> *Notwithstanding any other provision in this subchapter*, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to

> make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. 450j-1(b) (emphasis added); see § 205, 102 Stat. 2292. The "subchapter" to which this provision refers is Title 25 ("Indians"), Chapter 14 ("Miscellaneous"), Subchapter II ("Indian Self-Determination and Education Assistance"). It therefore encompasses all relevant provisions of the ISDA, including the contract support cost provisions of 25 U.S.C. 450j-1(a)(2).

As the D.C. and Federal Circuits have both recognized, the "unequivocal statutory language" of Section 450j-1(b) forecloses any contention that the ISDA guarantees full funding of contract support costs "as a matter of right." *Oglala Sioux*, 194 F.3d at 1380; see *Arctic Slope*, 629 F.3d at 1304 (Section 450j-1(b) "limits the Secretary's obligation to the tribes to the appropriated amount"); *Ramah Navajo Sch. Bd., Inc.*, 87 F.3d at 1345 ("[I]f the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds."). See also App., *infra*, 82a (Hartz, J., dissenting) ("[T]he ISDA does not require full payment. Full payment is conditioned on the availability of funds.").

The court of appeals was therefore mistaken in its essential premise that Congress "guarantee[d] funding" for all contract support costs. App., *infra*, 45a. The Tenth Circuit has since reaffirmed this erroneous interpretation of the ISDA, holding that an Indian tribe is "entitled to a contract specifying the full statutory amount" of contract support costs, and that the government is forbidden even from negotiating for the tribe's agreement to accept a lower sum in light of the lack of available appropriations. *Southern Ute Indian Tribe* v. *Sebelius*, Nos. 09-2281 & 09-2291, 2011 WL 4348299, at *11 (10th Cir. Sept. 19, 2011) (*Southern Ute*). The court

of appeals declared in *Southern Ute* that "[a] tribe cannot be forced to enter into a self-determination contract waiving its *entitlement* to full [contract support cost] funding." *Ibid.* (emphasis added).

As the statutory provisions discussed above make clear, the ISDA creates no such unqualified "entitlement." To the contrary, the ISDA expressly reserves Congress's authority to control the expenditure of public funds "[n]otwithstanding any other provision" of the Act, including the provisions governing contract support costs. 25 U.S.C. 450j-1(b). Congress consequently did not "breach" any statutory "promise" to respondents (App., *infra*, 45a) by exercising its statutorily reserved and constitutionally rooted authority to limit the amount of funds in the Treasury available to pay such costs. Because the ISDA itself did not mandate payment in these circumstances, respondents have no right to recover under the terms of the Act. See *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1555 (2009); *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003).

b. The court of appeals also sought to justify its decision in terms of contract law. *E.g.*, App., *infra*, 26a-34a. But the Secretary did not promise to pay respondents' contract support costs irrespective of available appropriations. Indeed, the Secretary could not have bound the government to pay costs in excess of the amounts appropriated by Congress. See *Sutton*, 256 U.S. at 579. Consistent with the model agreement in the ISDA, the Secretary's contracts with respondents specified that all funding was "[s]ubject to the availability of appropriations." 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4)); see App., *infra*, 10a-11a. This Court held that equivalent language in the contracts at issue in *Cherokee* did not relieve the government of liability because, in

that case, "Congress appropriated adequate unrestricted funds" to pay the tribes' claims. 543 U.S. at 643. Here, by contrast, the relevant appropriations are both inadequate and expressly restricted.

Moreover, as the dissent below explained, other provisions in the parties' agreements "recognized that contract-support costs might not be fully paid." App., *infra*, 51a (Hartz, J., dissenting). For example, the Oglala Sioux annual funding agreement for 2001 provided that the tribe's indirect cost recovery would be calculated by multiplying the amount that the tribe would otherwise receive by a "percentage of rate funded by BIA"—*i.e.*, a rate tied to the available appropriations. See *id.* at 51a-53a; see also *id.* at 51a (quoting contract language providing that funding for contract support costs "shall be provided by the Bureau of Indian Affairs, subject to the availability of funding"); *id.* at 12a-13a (majority opinion) (noting that annual funding agreements for Ramah Navajo and Oglala Sioux reflected "uncertainty" about the contract support cost funding rate because the BIA did not determine the rate until the fiscal year was underway). Like the ISDA itself, therefore, the parties' contractual agreements recognized that funding for all contract support costs was *not* guaranteed, but was instead contingent upon the availability of appropriations.

The Tenth Circuit nonetheless believed that the government could properly be held liable under the rationale of *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), which the court of appeals construed to establish a "bright-line" rule that "[i]f more than one contractor is covered by an appropriation, the failure to appropriate funds sufficient to pay *all* such contractors does not relieve the government of liability." App., *infra*, 31a-32a.

Because Congress here appropriated sufficient funds to meet the contract support funding needs of any *one* tribal contractor considered in isolation, the court reasoned, the government is required to pay *all* of the contract support costs of *every* tribal contractor. *Id.* at 29a-30a.

As the Federal Circuit recognized in rejecting the same contention, that approach would "effectively defeat" Congress's invocation of its expressly reserved authority under the Appropriations Clause to impose binding limits on the disbursement of public funds from the Treasury. *Arctic Slope*, 629 F.3d at 1304; see also App., *infra*, 47a (Hartz, J., dissenting) (explaining that the majority's reasoning "renders futile the spending cap imposed by Congress"). The manifest purpose of Congress in enacting the appropriations caps was to limit the use of public funds for the payment of ISDA contract support costs. The court of appeals' theory, under which *every* tribal contractor could recover its reasonable costs from the Treasury irrespective of the total sum, is fundamentally inconsistent with that intent and would render the appropriations caps meaningless. Significantly, the Secretary has limited authority under the ISDA to decline to enter into additional contracts as a means of controlling costs. See 25 U.S.C. 450f(a)(1) and (2); see also *Southern Ute*, 2011 WL 4348299, at *8 (holding that the government could not decline a new ISDA contract requested by a tribe on the ground that the available appropriations were insufficient to pay the tribe's contract support costs). Congress's only conceivable purpose in enacting the appropriations caps was therefore to limit the amounts distributed by the Secretary under existing self-determination contracts—an

outcome that the text of the ISDA expressly permits. 25 U.S.C. 450j-1(b).

The rationale of *Ferris*, on which the court of appeals relied, is entirely inapposite in this context. *Ferris*, like *Cherokee*, involved a government promise made against the backdrop of an unrestricted, lump-sum appropriation. See *Arctic Slope*, 629 F.3d at 1304. Here, by contrast, "there is a statutory cap and no ability to reallocate funds from non-contract uses." *Ibid.* Moreover, unlike the contractor in *Ferris*, which operated under a general appropriation and was "not chargeable with knowledge of its administration," 27 Ct. Cl. at 546, respondents here have been well aware since FY 1994 of the insufficiency of available appropriations to pay all contract support costs. For more than a decade, the BIA published a notice in the Federal Register each year describing the shortfalls in funding for contract support costs and the methodology the agency would use to allocate the available money. App., *infra*, 9a (collecting citations); see, *e.g.*, 58 Fed. Reg. at 68,694. As the dissent below explained, the "very purpose" of these notices was to "warn[] tribal organizations of the possibility of insufficient funding." App., *infra*, 50a. In 2006, in consultation with tribes, the agency adopted an explicit nationwide policy for the equitable distribution of funding for contract support costs in light of the recurring shortfalls. See note 4, *supra*. And each year the BIA has developed its budget requests—including any requests for additional contract support cost funding—in consultation with the tribes. See 25 U.S.C. 450j-1(i). The inadequacy of available appropriations, in short, has been "no secret." App., *infra*, 49a (Hartz, J., dissenting). The animating concerns of *Ferris* are thus absent here.

Furthermore, as the Federal Circuit observed, *Ferris* is particularly irrelevant in this context because the ISDA relieves the Secretary of any obligation to reallocate available funds among tribes and tribal organizations. 25 U.S.C. 450j-1(b); see *Arctic Slope*, 629 F.3d at 1304. As the majority below acknowledged, allocating inadequate funds under a capped appropriation is inescapably a zero-sum endeavor: "the Secretary *necessarily* takes from one tribe to pay another whenever funding falls short of total need." App., *infra*, 21a. Yet the court declared the government liable for all tribes' costs under *Ferris* precisely because the Secretary *could* have paid the entire amount requested by any individual tribal organization, to the detriment of the others. See *id.* at 30a (asserting that "there is no statutory restriction that would preclude the Secretary from using appropriated funds to pay full [contract support cost] need to the individual contractors bringing suit"). Section 450j-1(b) frees the Secretary to distribute the available funds among contractors in an equitable fashion by making clear that the Secretary is not required to prefer one tribe or tribal organization over another in that manner.

C. The Question Presented Is Important

The Tenth Circuit's decision vitiating limits imposed by Congress on the expenditure of funds from the Treasury warrants this Court's review. The Court has not previously considered the application of Appropriations Clause principles to government contracts in circumstances akin to those at issue here. Indeed, it appears that the Court has not addressed the subject at any length since its 1921 decision in *Sutton*, *supra*. Particularly in an era of increasing federal budgetary pressure, the authority of Congress to impose—and the obligation

of federal courts to respect—mandatory ceilings on the expenditure of appropriated funds for designated purposes is a question of great prospective importance.

As this Court explained in *OPM* v. *Richmond*, the Appropriations Clause ensures "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." 496 U.S. at 427-428. The appropriations caps imposed in this case reflect a judgment by Congress that, although the federal policies that are served by funding contract support costs under the ISDA are important, those policies do not warrant the unlimited disbursement of public money at the expense of other priorities, including other programs benefitting Indians and Indian tribes. Thus, the Conference Report accompanying the first capped appropriation for the BIA in FY 1994 explained that it was necessary to impose a limit because "significant increases in contract support will make future increases in tribal programs difficult to achieve." H.R. Conf. Rep. No. 299, 103d Cong., 1st Sess. 28 (1993). Likewise, legislators explained their decision to continue limiting the appropriations available to the Indian Health Service for contract support costs in FY 2000 on the ground that Congress "cannot afford to appropriate 100% of contract support costs at the expense of basic program funding for tribes." *Arctic Slope*, 629 F.3d at 1306 (quoting H.R. Rep. No. 222, 106th Cong., 1st Sess. 112 (1999)).

It is exactly such "difficult judgments reached by Congress as to the common good" that the Appropriations Clause exists to protect. *OPM* v. *Richmond*, 496 U.S. at 428. Congress in the ISDA explicitly reserved its prerogative to make such judgments, see 25 U.S.C.

450j(c), 450j-1(b), and it has expressed its intent to limit federal spending on contract support costs with unmistakable clarity in the annual appropriation acts for the Department of the Interior each year for more than 15 years. Yet even this was not enough for the court of appeals. In the court's view, if Congress wished to cap federal spending on contract support costs without amending the substantive provisions of the Act, it was required to "limit appropriations on a contract-by-contract basis" for hundreds of tribal organizations nationwide. App., *infra*, 46a. That extraordinary conclusion should not be permitted to stand.

This Court's intervention is additionally appropriate because of the importance of the question presented to the uniform and effective administration of the ISDA. According to agency data, nearly 40% of the BIA's annual budget for social and economic programs for Indian tribes is administered directly by tribal organizations under ISDA self-determination contracts. The decision below has left federal and tribal officials alike uncertain of their respective financial obligations for the maintenance of important federal programs. Meanwhile, the accumulated tribal requests for unfunded contract support costs are estimated to exceed $1 billion, and the problem grows worse with each federal budget cycle. This Court's review is needed.

D. This Case Provides The Preferable Vehicle For The Court's Review

The Solicitor General is filing, simultaneously with this petition, the government's response to the petition for a writ of certiorari in *Arctic Slope*, No. 11-83. The Tenth Circuit's decision below presents a better vehicle for the Court's resolution of the question presented for

at least two reasons. First, because it involves a nationwide class action, the decision below starkly illustrates the fundamental flaw in the tribes' position in these cases: the Secretary could not satisfy the contract support cost demands of all members of the respondent class in any fiscal year without exceeding the statutory appropriations cap imposed by Congress for that year. Granting review in this case would thus permit the Court to resolve the question presented in a factual context that appropriately tests the limits of each party's legal theory.

Second, the plaintiff contractor in *Arctic Slope* received all of the funding for contract support costs specifically contemplated in its annual funding agreements, entirely apart from any question of the sufficiency of appropriations. See 639 F.3d at 1300-1301 (noting that the contractor "does not claim that the Secretary failed to pay the secretarial amount, or the contract support costs specified in the Annual Funding Agreements"). That fact furnishes an additional basis on which the government would be entitled to prevail in *Arctic Slope* that is not necessarily present with respect to the contracts at issue here. The decision below thus presents a better vehicle for the Court to reach and decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-2262

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE; PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

KENNETH SALAZAR, SECRETARY OF THE INTERIOR; LARRY ECHO HAWK, ASSISTANT SECRETARY OF THE INTERIOR; MARY L. KENDALL, ACTING CHIEF OF OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR;[1] UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES,

AND

THE NATIONAL CONGRESS OF AMERICAN INDIANS, AMICUS CURIAE

[Filed: May 9, 2011]

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[1] Pursuant to Fed. R. App. P. 43(c)(2) Kenneth Salazar is substituted for former Secretary of the Interior, Dirk Kempthorne; Larry Echo Hawk is substituted for former Assistant Secretary of the Interior, Eddie Brown; and Mary L. Kendall is substituted for former Chief of Office of Inspector General, Marvin Pierce.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:90-CV-00957-LH-KBM)

Before: LUCERO, MCKAY, and HARTZ, Circuit Judges.

LUCERO, Circuit Judge.

We are faced with an apparent contradiction. Pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA"), the United States enters into self-determination contracts with Indian tribes and tribal organizations "for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." 25 U.S.C. § 450b(j). These agreements include contract support costs ("CSCs") which are the "reasonable costs for activities that must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management," but would not be paid by the Secretary of the Interior if the federal government operated the contracted program directly. § 450j-1(a)(2). Congress has mandated that all self-determination contracts provide full funding of CSCs, *see* § 450j-1(g), but has nevertheless failed to appropriate funds sufficient to pay all CSCs every year since 1994, instead capping appropriations at a level well below the sum total of CSCs. *See, e.g.*, Dep't of the Interior & Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, tit. I, 108 Stat. 2499, 2511 (1994).

These funding shortfalls have threatened tribal programs designed to fulfill the congressionally mandated

goal of the ISDA to "enhance the progress of Indian people and their communities." 25 U.S.C. § 450(a)(1). Contracts for programs absolutely essential to self-government, such as law enforcement, economic development, and natural resource management, have become "unworkable" in the words of a tribal representative. As a result, several tribes and tribal organizations brought suit seeking to collect the promised, but unappropriated, CSCs.

The government urges us to affirm the district court and resolve the ISDA/appropriations contradiction by holding that the phrase "subject to the availability of appropriations," included in both the ISDA, *see* § 450j-1(b), and all self-determination contracts, *see* § 450*l*(c), unambiguously eliminates the government's obligation to pay CSCs unless Congress appropriates funds to pay *all* CSCs on *every* self-determination contract. Plaintiffs counter that the phrase "subject to the availability of appropriations" must be interpreted from the perspective of the individual contractor, not by reference to all contractors who might lay claim to a given appropriation. In other words, only Congressional funding decisions—not discretionary allocation decisions made by an agency—can render an appropriation unavailable.

Following a recent Supreme Court case addressing a nearly identical issue, we conclude that plaintiffs' interpretation is reasonable. As the Court held in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." *Id.* at 641 (quotation omitted). Fol-

lowing our canon of construction requiring that an act be construed in favor of a reasonable interpretation advanced by a tribe, *see Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997), and the ISDA's requirement that contracts be construed in favor of the contractor, 25 U.S.C. § 450*l*(c), we hold that the government remains liable because the annual CSC appropriations were sufficient to cover any individual contract.

Exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's grant of summary judgment in favor the government and remand for further proceedings.

I

This appeal comes after nearly two decades of litigation under the ISDA by Ramah Navajo Chapter ("Ramah"). The statutory and administrative landscape provides an important backdrop for our legal analysis.

A

Prior to the ISDA, educational and governmental services were provided directly by the federal government to the hundreds of federally recognized tribes in the United States. Acknowledging that "Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people," 25 U.S.C. § 450(a)(1), Congress enacted the ISDA to "permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services," § 450a(b). The ISDA reaffirms the "Federal Government's unique and continuing relationship

with, and responsibility to, individual Indian tribes and to the Indian people as a whole." § 450a(a). It pursues a goal of Indian "self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." *Id.*

Pursuant to the ISDA, the Secretary of the Interior and the Secretary of Health and Human Services are directed to enter into self-determination contracts upon the request of a tribe, provided that the request satisfies several statutory criteria. *See* §§ 450b(i), 450f(a). The Secretary must provide the amount that the agency "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." § 450j-1(a)(1). These contracts effectively transfer responsibility for various programs from federal agencies to the tribes themselves, while maintaining federal funding of the programs.

Congress soon recognized that providing only the funds the Secretary would have spent operating a given program created a "serious problem" because those funds do not cover "federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements." S. Rep. No. 100-274, at 8 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2627. As a result, tribal resources "which are needed for community and economic development must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility." *Id.* at 9, *reprinted in* 1988 U.S.C.C.A.N. at 2628. Congress accordingly amended the ISDA to

require full funding of CSCs. *See* Indian Self Determination Act Amendments of 1987, Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292-94 (1988).

CSCs include "direct program expenses for the operation of the Federal program that is the subject of the contract," 25 U.S.C. § 450j-1(a)(3)(A)(i), and "any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract," § 450j-1(a)(3)(A)(ii). The latter category appears to correspond to "indirect costs" which are defined as the "costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved." § 450b(f). Indirect costs are generally calculated by multiplying the "contract funding base" by the "indirect cost rate," a negotiated figure. *See* § 450b(b), (g); S. Rep. No. 100-274, at 9, *reprinted in* 1988 U.S.C.C.A.N. at 2628 ("Tribal indirect cost rates are negotiated and approved according to OMB guidelines by the Department of the Interior Office of Inspector General.").

Under the revised ISDA, CSC funding "*shall* be added to the amount" the Secretary would have spent on the program subject to a self-determination contract. 25 U.S.C. § 450j-1(a)(2) (emphasis added). Another section of the ISDA provides that "[u]pon the approval of a self-determination contract, the Secretary *shall* add to the contract the *full amount* of funds to which the contractor is entitled under [§ 450j-1(a)]." § 450j-1(g) (emphasis added). However, the ISDA twice states that entitle-

ment to self-determination contract funding is "subject to the availability of appropriations." §§ 450j(c)(1), 450j-1(b). It further provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." § 450j-1(b).

The phrase "subject to the availability of appropriations" has become highly significant because of Congress' ISDA funding decisions. In 1994, Congress began capping CSC funding. The 1994 appropriations act for the Department of the Interior allocated nearly $1.5 billion to the Bureau of Indian Affairs ("BIA"), but provided that "not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the Indian Self-Determination Act." Dep't of the Interior & Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, tit. I, 107 Stat. 1379, 1390-91 (1993). The Conference Report on the appropriations bill suggested Congress was apprehensive about the growth of CSCs:

> The managers remain very concerned about the continued growth in contract support costs, and caution that it is unlikely that large increases for this activity will be available in future years' budgets. It is also a concern that significant increases in contract support will make future increases in tribal programs difficult to achieve.

H.R. Conf. Rep. No. 103-299, at 28 (1993). A Senate Report accompanying the following year's appropriations act noted "that significant shortfalls exist for fiscal year

1994 contract support funding," but advised that the "shortfalls should be treated as one-time occurrences and should not have any impact on determining future indirect cost rates." S. Rep. No. 103-294, at 57 (1994).

Despite this expectation, funding shortfalls for CSCs were repeated every fiscal year from 1994 to 2001. Later appropriations acts, usually passed at the beginning of the fiscal year, used the phrase "contract support costs" rather than "indirect costs," but each included the same "not to exceed" language. *See* tit. I, 108 Stat. at 2511; Omnibus Consol. Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-170 (1996); Omnibus Consol. Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-192 (1996); Dep't of the Interior & Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, tit. I, 111 Stat. 1543, 1554 (1997); Omnibus Consol. & Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-245 (1998); Consol. Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-148 (1999); Dep't of the Interior & Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, tit. I, 114 Stat. 922, 934 (2000).

B

Following the passage of each appropriations act, the BIA issued a notice in the Federal Register discussing the CSC shortfalls. The 1994 notice warned of "a shortfall of at least $ 10,000,000 in FY 1994 and possibly a shortfall as high as $ 25,000,000." Distribution of Fiscal Year 1994 Contract Support Funds, 58 Fed. Reg. 68,694, 68,694 (Dec. 28, 1993). It also reminded tribal contractors that the BIA "can only utilize the amount appropri-

ated for the [CSC] account to meet indirect cost needs." *Id.* Because of the projected shortfall, the BIA requested "a report showing the amounts provided to cover prior year shortfalls, the amounts and percentages funded for current year contracts and a revised detailed need request" from each area office. *Id.* The agency hoped to provide instructions "advising each area of the level to be applied to each contract," around May 1, 1994. *Id.*

Notices published for subsequent years similarly requested interim reports on CSC need at some point during the operative fiscal year. After receiving the reports, and well into the fiscal year for which funding was provided, the BIA would calculate the amount of the shortfall and provide CSC funding on a uniform, pro-rata basis. *See* Distribution of Fiscal Year 1995 Contract Support Funds, 59 Fed. Reg. 55,318 (Nov. 4, 1994); Distribution of Fiscal Year 1996 Contract Support Funds, 61 Fed. Reg. 16,106 (Apr. 11, 1996); Distribution of Fiscal Year 1997 Contract Support Funds, 62 Fed. Reg. 1468 (Jan. 10, 1997); Distribution of Fiscal Year 1998 Contract Support Funds, 63 Fed. Reg. 5398 (Feb. 2, 1998); Distribution of Fiscal Year 1999 Contract Support Funds, 64 Fed. Reg. 2658 (Jan. 15, 1999); Distribution of Fiscal Year 2000 Contract Support Funds, 65 Fed. Reg. 10,100 (Feb. 25, 2000); Distribution of Fiscal Year 2001 Contract Support Funds, 66 Fed. Reg. 15,275 (Mar. 16, 2001).

The Department of Interior appropriation for fiscal year 1995, for example, was passed on September 30, 1994, the last day of fiscal year 1994. The BIA requested initial reports of CSC need by December 1, 1994. Distribution of Fiscal Year 1995 Contract Support

Funds, 59 Fed. Reg. 55,318 (Nov. 4, 1994). After receiving these initial reports, the BIA disbursed 75 percent of the total amount reported. *Id.* It requested a second set of reports by July 10, 1995, and planned a final distribution of the remainder of CSC funds well into the fiscal year—"on or about July 31, 1995 [ten months into the fiscal year], on the basis of these reports." *Id.* "If the reports indicate that [the appropriated sum] will not be sufficient to cover the entire need, this amount will be distributed so that all offices receive the same percentage of their reported need for distribution at this same percentage." *Id.* The BIA funded 91.74 percent of the actual CSCs on each self-determination contract in fiscal year 1995. Between 1994 and 2004, the CSC funding rate ranged from 77 to 93 percent for each fiscal year.

C

Plaintiffs Ramah and the Oglala Sioux Tribe ("Oglala") are parties to long-term "mature" self-determination contracts of indefinite duration with the United States pursuant to the ISDA. *See* 25 U.S.C. § 450b(h). Like all self-determination contracts, plaintiffs' agreements expressly incorporate the ISDA. They further provide that the ISDA and "each provision of this contract shall be liberally construed for the benefit of the contractor." A section titled "FUNDING AMOUNT" states:

> Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the

> Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

The annual funding agreements ("AFAs"), incorporated by reference in the mature contracts, describe attachments containing "terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment." As their name implies, AFAs are renegotiated each year. Like the main self-determination contracts, AFAs include language discussing the availability of appropriations.

Ramah's 2000 AFA[2] sets out "Tentative FY 2000 Funding" for various programs and activities "using FY 99 funding levels." The AFA also uses a tentative indirect cost rate, adopting the last rate approved by the Office of Inspector General, which occurred in calendar year 1998.[3] The AFA explains:

> Indirect Cost rate[s] for Calendar Year 1999 and 2000 have not been completed yet with the Office of Inspector General. As of the date of submittal of this AFA, neither has the Chapter completed its Calendar Year 2000 Indirect Cost proposal. The last approved IDC rate was for CY 1998 at 86.4%. Based on this last approved rate, Ramah Navajo Chapter requests that the CY 1998 IDC negotiated final rate be

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[2] Oglala's AFAs are substantially similar.

[3] The indirect cost rate is distinct from the CSC funding rate. One, the indirect cost rate, is multiplied by the non-CSC contract amount to reach an estimate of indirect cost CSCs. *See Cherokee*, 543 U.S. at 635. The other, the CSC funding rate, is the percentage of total CSC need for which Congress actually appropriated funds.

used to temporarily fund IDC at 100% level. NOTE*: (Funding of the amount shall be subject to the availability of appropriation. . . .). As soon as funding has been appropriated and sub-allotted to the Ramah Navajo Agency, funds will be added to the AFA.

(i) Direct Contract Support Costs are to be negotiated within the first ninety, (90) days of the new contract term and shall be funded from the BIA's Indian Self-Determination Fund as soon as resources can be made available, but not later than September 30, 2000. The Contractor reserves the right to annually renegotiate its need for Direct Contract Support Costs in accordance with Sec. 106(a)(3)(B) of the Act [25 U.S.C. § 450j-1(a)(3)(B)]. Funding of the amount needed shall be subject to the availability of appropriations.

(ii) Outstanding Indirect Cost issues from past fiscal years which Ramah Navajo Chapter has not received will be subject to continuing discussion until resolved.

. . . .

. . . Funding for additional contract support costs shall be added to the AFA for the Contractor which includes Indian Self-Determination Fund direct and indirect type costs. The amount of Indirect Cost Funding shall be based upon the Contractor's Indirect Cost Agreement which is applicable to this period of performance.

As these provisions make clear, Ramah faced two levels of uncertainty at the time it entered into the AFA.

First, the indirect cost rate was subject to negotiation and approval by the Office of Inspector General, meaning that the amount of the contract was undetermined. Second, even after the amount of the AFA was finalized, the actual payment forthcoming from the BIA was unknown because the agency did not determine the CSC funding rate until the fiscal year was well underway. Ramah did not receive notice of the exact amount of contract funding until the last month of each fiscal year. As an accounting consultant to Ramah and Oglala describes it, this system "allowed one party to the contract, the government, to set the price after the service has been performed by the other party."

D

Ramah originally brought this class action in 1991 seeking to alter the manner in which the BIA calculated indirect cost rates. After this court held in favor of plaintiffs, *see Ramah Navajo Chapter*, 112 F.3d at 1455, the parties entered into several partial settlement agreements, *see Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002); *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). During these settlement negotiations, Oglala intervened as plaintiffs. The Pueblo of Zuni also intervened later in the proceedings.

This appeal arises from a motion for summary judgment filed by plaintiffs in February 2000, seeking a declaration that they are entitled to unpaid CSCs from fiscal year 1994 forward. Plaintiffs sought relief pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601-13, after exhausting their administrative remedies. *See* 25 U.S.C. § 450m-1(d). The government cross-moved for summary

judgment, contending that its CSC obligation was dependent upon Congress appropriating funds sufficient to pay CSCs on every self-determination contract. These competing cross-motions were stayed pending the outcome of *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), *rev'd sub nom. Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

After receiving supplementary briefing on the impact of *Cherokee*, the district court granted the government's motion. It held that "the United States is not liable for shortfalls in contract payments when Congress has specified an insufficient 'not to exceed' lump sum appropriation." Plaintiffs timely appealed.

II

We review the grant of summary judgment de novo. *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000). A party is entitled to summary judgment only if, viewing the evidence in the light most favorable to the non-moving party, the movant is entitled to judgment as a matter of law. *Id.*

A

In construing the statute at issue, we begin with its plain text. *See Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000). "If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances." *Id.* "We also take into account the broader context of the statute as a whole when ascertaining the meaning of a particular provision." *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1381 (10th Cir. 2009) (quotation omitted).

If a statute is ambiguous, we "look to traditional canons of statutory construction to inform our interpretation." *Id.* (citation omitted). One such canon is particularly important in this case: In deciding between two reasonable interpretations, "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes. . . . The result, then, is that if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter*, 112 F.3d at 1462 (quotation and citations omitted). This canon, grounded in the trust relationship between the federal government and Indian tribes, applies with equal force to interpretations of contracts. *See* Felix S. Cohen, Handbook of Federal Indian Law 224-25 (1982 ed.) ("Statutes, agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of establishing Indian rights. . . . These canons play an essential role in implementing the trust relationship between the United States and Indian tribes. . . . "). The ISDA, its legislative history, and the self-determination contracts at issue confirm the applicability of this canon to the present dispute. *See* 25 U.S.C. § 450*l*(c) (terms of model agreement included in all self-determination contracts provide that "each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor" (model agreement § (a)(2))); S. Rep. No. 100-274, at 3 *reprinted in* 1988 U.S.C.C.A.N. at 2622 ("[F]ederal action toward Indians as expressed in treaties, agreements statutes, executive orders, and administrative regulations is construed in light of the trust responsibility.").

B

We are presented with competing interpretations of the phrase "subject to the availability of appropriations." The government argues that the phrase unambiguously limits the plaintiffs' entitlement to CSC funding to a pro rata share determined by multiplying individual CSC need by the ratio of total CSC appropriations to total CSC need. Plaintiffs contend that "availability" refers to the ability of the government to pay a particular tribe's CSCs, not its ability to pay all tribes' CSCs. Under this construction, the phrase voids the government's obligation on a given contract only if Congress fails to appropriate enough funds to pay that particular contract. In essence, the dispute asks whether we must take into account the Secretary's discretionary funding of other contractors in determining whether the appropriation is "available" for a particular contract.

The terms of the ISDA and the contracts do not definitively answer this question. The phrase "subject to the availability of appropriations" could refer, as the government urges, to whether Congress has appropriated sufficient funds to pay the aggregate of hundreds of self-determination contracts. This formulation would require a court to await an agency's allocation of an appropriation before determining whether funds are available. However, the phrase could also refer, as the tribes contend, to a limitation on an individual contract without reference to other self-determination contracts. Fortunately, although the statutory and contractual language does not dictate one party's position over the other, we do not write on a blank slate.

III

We begin with three principles set down by the Supreme Court. First, a "fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (quotation omitted). Second, there is no merit to the "claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors." *Cherokee*, 543 U.S. at 640 (citation omitted). Third, "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." *Id.* at 641 (quotation omitted).

A

The first principle relevant to this dispute is that of unfettered agency discretion in distributing appropriations. "A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit." *Lincoln*, 508 U.S. at 192 (quoting *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984)). Although an agency may create ill will by ignoring congressional intent as expressed in legislative history, "[a]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives,

. . . the decision to allocate funds is committed to agency discretion by law." *Lincoln*, 508 U.S. at 193 (quotation omitted).

The Court's discussion of "permissible statutory objectives," *id.*, implicates the concept of legal availability. In *In re LTV Aerospace Corp.*, 55 Comp. Gen. 307 (1975), the Comptroller General explained the rule later adopted explicitly by the *Lincoln* Court, *see* 508 U.S. at 192, 193, by reference to this concept:

> If the Congress desires to restrict the availability of a particular appropriation . . . , such control may be effected by limiting such items in the appropriation act itself. . . . In the absence of such limitations an agency's lump sum appropriation is legally available to carry out the functions of the agency.

In re LTV Aerospace Corp., 55 Comp. Gen. at 319.[4]

The General Accounting Office describes "legal availability" as follows:

> [D]ecisions are often stated in terms of whether appropriated funds are or are not "legally available" for a given obligation or expenditure. This is simply another way of saying that a given item is or is not a legal expenditure. Whether appropriated funds are legally available for something depends on three things:
>
> 1. the purpose of the obligation or expenditure must be authorized;

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[4] Comptroller General opinions are not binding, but provide "expert opinions, which we should prudently consider." *Cherokee Nation*, 334 F.3d at 1084 (quotation omitted).

2. the obligation must occur within the time limits applicable to the appropriation; and

3. the obligation and expenditure must be within the amounts Congress has established.

1 U.S. Gen. Accounting Office, Principles of Federal Appropriations Law 4-6 (3d ed. 2004) (the "GAO Redbook").[5]

The import of *Lincoln* to the case at bar is that the Secretary was free to disburse the funds appropriated by Congress in any manner the Secretary chose, provided that the funds were legally available for the expenditures chosen. Thus, for example, the Secretary could have provided CSC funding on a first-come, first-served basis, covering the entire CSC need for those tribes and tribal organizations with the oldest contracts.

Similarly, the Secretary could have selected those contracts that covered the most essential services and paid full CSC need to those contractors. And of course, the Secretary's chosen course of action, disbursing a pro-rata share to all contractors, was permissible because the funds were legally available to be used on CSCs.

We recognize that a divided panel of the D.C. Circuit ruled that the ISDA requires pro-rata funding in the event of limited appropriations. *See Ramah Navajo*

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[5] Like Comptroller General opinions, the GAO Redbook is not binding but offers persuasive agency analysis. *See Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1354 (Fed. Cir. 2005) ("In considering the effect of appropriations language both the Supreme Court and this court have recognized that the General Accounting Office's publication, Principles of Federal Appropriations Law (hereinafter the 'GAO Redbook') provides significant guidance." (citations omitted)).

School Board v. Babbitt, 87 F.3d 1338, 1349 (D.C. Cir. 1996). Although the panel majority is somewhat opaque, it appears to hold that pro rata distribution is required because full funding of individual CSCs is mandated when Congress appropriates enough funds to cover all contracts. *See id.* at 1348 ("[T]he Act informs the Secretary exactly how the full funding should be allocated, and that method provides a meaningful standard by which to review the Secretary's dissemination of the *insufficient* funds as well."). We are not persuaded by this reasoning.

The ISDA text simply states that "[t]he Secretary shall add to the contract the full amount of" CSCs, and that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." 25 U.S.C. § 450j-1(b), (g). To hold that these provisions unambiguously require pro rata funding if Congress fails to provide enough money to pay all CSCs stretches the statutory text far beyond its breaking point. Although a pro rata distribution is attractive as a Solomonic solution to the problem of a statutory mandate and budgetary limitations, viewing it as a requirement runs afoul of *Lincoln*. *See* 508 U.S. at 193.

The dissent in *Ramah Navajo School Board* provides a far more compelling treatment of the issue. It cites *Lincoln* for the proposition that "requiring close adherence to a 'formula' is flatly improper where the Secretary has express statutory discretion over the allocation of a fund." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1355 (Silberman, J., dissenting). Because the ISDA provides no statutory guidance in the event that appropriations fall below total CSC need, *Lincoln* stands for the propo-

sition that the Secretary has "unreviewable discretion" in allocating the funds. *Ramah Navajo Sch. Bd.*, 87 F.3d at 1355 (Silberman, J., dissenting). With respect to 25 U.S.C. § 450j-1(b), which states that the Secretary is not required to reduce funding to one tribe to pay another, the dissent points out that the Secretary *necessarily* takes from one tribe to pay another whenever funding falls short of total need regardless of the selected allocation method. "Obviously, anytime the Secretary is asked to increase his proposed funding for one or more tribes out of a limited appropriation, he necessarily must reduce funding for the rest. There is no escaping the zero sum game." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1354 (Silberman, J., dissenting).

We agree with the *Ramah Navajo School Board* dissent: "the Secretary is under no legal obligation in the event of a shortfall to meet any particular ratio of distribution among the tribes." *Id.* at 1353 (Silberman, J., dissenting).

B

The second concept key to our disposition can be simply stated, but is too easily ignored: The tribes and tribal contractors with ISDA contracts are independent entities with independent rights and entitlements. There are over 600 tribes and tribal entities with self-determination contracts, ranging from small Alaskan villages to the immense Navajo Nation, and including tribal consortiums such as the Great Lakes Indian Fish and Wildlife Commission. They are not a single conglomerated entity simply because each lays claim to a portion of the same appropriation any more than all fed-

eral highway contractors represent a single, undifferentiated mass.

In *Cherokee*, the Supreme Court roundly rejected the government's "claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors." *Cherokee*, 543 U.S. at 640 (citation omitted). In rejecting this argument, the Court cited *Ferris v. United States*, 27 Ct. Cl. 542 (1892), a venerable Court of Claims opinion which sets forth the traditional rule regarding the effect of insufficient appropriations:

> A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.

Id. at 546 (citing *Dougherty v. United States*, 18 Ct. Cl. 496 (1883)). *Dougherty*, the case upon which *Ferris* relies, explained the salient distinction between multicontract appropriations and single-contract appropriations:

> [W]hen one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, and cannot recover beyond it; but we have never held that persons con-

> tracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department. To do so might block the wheels of the Government. The statutory restraints in this respect apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government.

Dougherty, 18 Ct. Cl. at 503 (citation omitted).

The distinction identified in *Dougherty* remains valid; we now generally refer to appropriations as falling into one of two categories: line-item or lump-sum. "A *lump-sum appropriation* is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a *line-item appropriation* is available only for the specific object described." 2 GAO Redbook at 6-5; *see also id.* at 6-6 ("[A] lump-sum appropriation is simply one that is available for more than one specific object.").

It may be tempting to consider all tribes' claims to an appropriation collectively, to view tribal self-determination contract funds as a single line-item appropriation, and to assume that because funds were insufficient to pay all tribal contractors they were unavailable to each contractor, but *Cherokee*, *Ferris*, and *Dougherty* prohibit such analytical shortcuts.

C

Finally, we must consider *Cherokee*'s guidance that "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." 543 U.S. at 641 (quotation omitted).

In *Cherokee*, the Court considered an issue nearly identical to that under review: the *Cherokee* plaintiffs sought to collect CSC payments for contracts funded by appropriations that lacked an annual cap. The government took the position that "it is legally bound by its promises if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so." 543 U.S. at 636. Plaintiffs countered that "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations.'" *Id.* at 637. This is true, they argued, "even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made." *Id.*

The Court agreed with plaintiffs, quoting the *Ferris* rule. *Cherokee*, 543 U.S. at 637-38 (quoting *Ferris*, 27 Ct. Cl. at 546). It noted that the ISDA "reflects a congressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future." *Cherokee*, 543 U.S. at 639.

Turning to the "subject to the availability of appropriations" language, the Court stated:

> Language of this kind is often used with respect to Government contracts. This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year. It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.

Id. at 643 (citations omitted).

Relying on *Ferris*, the Court held that the "subject to the availability of appropriations" language did not help the government "[s]ince congress appropriated adequate unrestricted funds here." *Cherokee*, 543 U.S. at 643. It rejected the government's argument that appropriations were "unavailable to pay contract support costs because the Government had to use those funds to satisfy . . . the costs of inherent federal functions, such as the cost of running the Indian Health Service's central Washington office." *Id.* at 641-42 (quotation omitted). "This argument cannot help the Government," the Court determined, "for it amounts to no more than a claim that the agency has allocated the funds to another purpose, albeit potentially a very important purpose." *Id.* at 642.

Cherokee accordingly held that an agency's decision to allocate legally available funds to some other permissible purpose does not render an appropriation unavailable with respect to an ISDA contract.

IV

In light of the foregoing principles, there are two potential interpretations of the effect of the "subject to the availability of appropriations" proviso. The first option would be to hold that funds are unavailable to an individual ISDA contractor because the Secretary spent to the CSC cap. In other words, the availability of appropriations would be determined *after* the Secretary, under his discretion, allocated CSC appropriations, and thus availability would turn on the Secretary's decisions. Under this interpretation, as long as the Secretary spends to the CSC cap, the Secretary may determine whether and to what extent the appropriation is available for each individual contractor.

Our second option would be to hold that the availability of appropriations to fund a specific contract must be determined without reference to the Secretary's discretionary allocation. If an appropriation is legally available to fund a particular contract, then the "subject to the availability of appropriations" condition is satisfied with respect to that contract. On this reading, each tribe is bound only by congressional funding choices as to its contract, not by the Secretary's allocation choices.

We conclude that the latter interpretation is reasonable and most consistent with *Cherokee*.

A

The appropriations at issue in *Cherokee* and those under consideration in this case share important characteristics. First, they are lump-sum appropriations because they were "made to cover a number of specific programs, projects, or items." 2 GAO Redbook at 6-5.

As the GAO Redbook discusses, the Comptroller General has applied this interpretation of "lump-sum" even when an appropriation covers only two, closely- related items.[6] The key legal principle applicable to lump-sum appropriations is that "as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives," federal law "gives the courts no leave to intrude. To that extent, the decision to allocate funds is committed to agency discretion by law." *Lincoln*, 508 U.S. at 193 (quotations and alteration omitted). In *Cherokee*, the lump-sum appropriation included the entire budget for the Department of the Interior; in this case, it includes the CSCs for more than 600 contracts.

Second, although the appropriations under consideration in this case explicitly cap a category of spending (CSCs), the appropriations at issue in *Cherokee* did the same. Unlike the "not to exceed" language regarding CSCs, *e.g.*, tit. I, 108 Stat. at 2511, the appropriations considered in *Cherokee* provided that a certain amount was appropriated "[f]or expenses necessary to carry out" various programs, *e.g.*, tit. II, 107 Stat. at 1408. But

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[6] In *Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812 (1976), the Comptroller General concluded that an appropriation covering expenditures for only two ships constituted a lump-sum expenditure. *Id.* at 821-22. According to the GAO,

> [t]he terms "lump-sum" and "line-item" are relative concepts. The $244 million appropriation in the *Newport News* case could be viewed as a line-item appropriation in relation to the broader "Shipbuilding and Conversion" category, but it was also a lump- um appropriation in relation to the two specific vessels included. *This factual distinction does not affect the applicable legal principle.*

2 GAO Redbook at 6-15 (emphasis added).

in both instances, the legal effect of the language is to cap appropriations for the authorized expenditures at a certain level. "Words like 'not more than' or 'not to exceed' are not the only ways to establish a maximum limitation. If the appropriation includes a specific amount for a particular object (such as 'for renovation of office space, $100,000'), then the appropriation establishes a maximum that may not be exceeded." 2 GAO Redbook 6-29 (citing 36 Comp. Gen. 526 (1957); 19 Comp. Gen. 892 (1940); 16 Comp. Gen. 282 (1936)).

Third, with respect to the availability of the appropriations, the government argues as it did in *Cherokee* that the appropriation is not available because the funds were exhausted by other objects for which the appropriation was legally available. In *Cherokee* the government claimed that it could not pay full CSC need to the Shoshone-Paiute and Cherokee Nation because "the costs of inherent federal functions, such as the cost of running the Indian Health Service's central Washington office," 543 U.S. at 641-42 (quotation omitted), had consumed the appropriation. In the present case, the government contends it cannot pay full CSC need to Ramah, Oglala, and Pueblo of Zuni because CSC payments to other tribes have used up the entire appropriation.

But the Supreme Court rejected this argument in *Cherokee*, deeming the government's position "no more than a claim that the agency has allocated the funds to another purpose, albeit potentially a very important purpose." *Id.* at 642. As the Court made clear, "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another

purpose or assumes other obligations that exhaust the funds." *Id.* at 641 (quotation omitted).

The government does not advance a compelling argument suggesting the result in this case must be different. It notes that Congress capped *total* CSC spending, but this does not explain why Ramah, Oglala, Pueblo of Zuni, or any one contractor could not be paid full CSC need. In *Cherokee*, the Court rejected the argument that the Secretary's discretionary allocation of funding for objects for which an appropriation was legally available rendered the appropriation unavailable for other objects. *See* 543 U.S. at 641. Yet that is precisely the argument advanced by the government. In both instances, the government claims that an appropriation is unavailable for a particular plaintiff's contract because the Secretary used the funds on other permissible expenditures.[7] The other expenditures at issue in *Cherokee* were less similar to the plaintiffs' contracts than the other expenditures in this case. But nothing in *Cherokee* suggests that the similarity between two objects for which an appropriation is legally available controls the issue under consideration, nor do we see a basis in logic for treating such similarity as dispositive.[8] The govern

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[7] Although, in contrast to *Cherokee*, the other permissible expenditures in this case are also statutorily mandated, *see* 25 U.S.C. § 450j-1(a)(2), the government cannot escape liability for one mandatory expenditure by appealing to its obligation to pay another without rendering the term "mandatory" meaningless.

[8] Although the dissent takes issue with our interpretation of *Cherokee*, it does not provide a meaningful distinction between the present situation and that considered by the Supreme Court in that case. (*See* Dissenting Op. 32-36.) It notes that the appropriations here are insufficient to cover all ISDA contracts, but the funds in *Cherokee* were

ment focuses on the *Cherokee* Court's use of the term "unrestricted appropriation," but we read this phrase as referring to restrictions that would render funds legally unavailable to pay the plaintiff's specific contracts. In this case, as in *Cherokee*, there is no statutory restriction that would preclude the Secretary from using appropriated funds to pay full CSC need to the individual contractors bringing suit.

The government also cites the ISDA's language that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." § 450j-1(b). But as discussed in Section III.A, *supra*, the Secretary always reduces funding from one tribe to pay another when appropriations fall short of total CSC need. Under the present pro rata system, each tribe's CSC funding is reduced by a certain percentage and made available to other tribes. The appropriations acts under consideration plainly required

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similarly insufficient to cover all objects for which the appropriation was available.

The dissent suggests that our interpretation must be incorrect because the *Cherokee* Court might have avoided some of the government's arguments more easily otherwise. (Dissenting Op. 33.) But the Court's selection of one doctrinal path does not lend itself to the inference that all other paths to the same result are infirm. "The authority of the case cannot properly be overthrown by showing, even if it could be shown, that the court might have reached the same result upon some other ground than that which in truth it adopted as the basis of its decision." *Union Tank Line Co. v. Wright*, 249 U.S. 275, 293 (1919) (Pitney, J., dissenting); *see also United States v. Mitchell*, 271 U.S. 9, 14 (1926) ("It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered.").

such reductions regardless of the discretionary decisions made by the Secretary. "There is no escaping the zero sum game." *Ramah Navajo Sch. Bd.*, 87 F.3d at 1354 (Silberman, J., dissenting).[9]

At base, the government's argument rests on an improper conflation of over 600 tribes and tribal contractors into one amalgamated contractor. For example, it argues that "in the face of a congressionally-capped appropriation, the agency simply could not lawfully pay plaintiffs the full amount of their CSCs." But this is incorrect. The Secretary possessed the discretion to pay any individual plaintiffs full CSC need. For example, in fiscal year 1998, Congress appropriated "not to exceed $105,829,000" for CSCs. Tit. I, 111 Stat. at 1554. The largest individual CSC entitlement that year was less than $14 million, and the second largest was under $4 million. It appears the government is relying on the fact that the appropriations were insufficient to pay all contractors, but as *Cherokee* held, there is no merit to the "claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors." 543 U.S. at 640 (citation omitted).

Ferris and *Dougherty* provide a bright-line formula that avoids uncertainty in government contracting: If more than one contractor is covered by an appropriation, the failure to appropriate funds sufficient to pay *all* such contractors does not relieve the government of lia-

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[9] Although the dissent relies on this provision for its contrary interpretation, it does not grapple with the fact that § 450j-1(b) is necessarily violated whenever Congress appropriates less than total CSC need. (*See* Dissenting Op. 32-33.)

bility. As *Dougherty* held, determining whether liability attaches based on such unfettered discretion in the disbursing agent sows uncertainty among contractors that could "block the wheels of the Government." 18 Ct. Cl. at 503. Instead of considering the discretionary actions of the disbursing agency, the availability of appropriations is determined by congressional action. As the Supreme Court explained in *Cherokee*, by signing contracts "subject to the availability of appropriations," the tribes agreed "that the contract will not become binding unless and until *Congress* appropriates funds for that year." 543 U.S. at 643 (emphasis added). In other words, the tribes agreed to be bound by congressional funding choices. But government contractors do not agree to be bound by the allocation choices of the disbursing agency or the contracts formed with other tribes and tribal entities

No case cited by the government contravenes the *Ferris/Dougherty* doctrine. Although the government relies upon several cases in which the government escaped liability, each involved a single-contract appropriation. *See Sutton v. United States*, 256 U.S. 575, 577-79 (1921) ($20,000 appropriation for a specific dredging project proved insufficient to pay the sole contractor); *Bradley v. United States*, 98 U.S. 104, 111-12 (1878) (line-item appropriation to pay lease for a post office); *Shipman v. United States*, 18 Ct. Cl. 138, 146 (1883) (single contractor appropriation for a road project which specified "that the work to be done and the materials to be furnished under this agreement shall be restricted to the amount allowed by Congress for this purpose" (emphasis omitted)).

We are also cognizant of the close parallel between the plaintiffs' interpretation of the phrase "subject to the availability of appropriations," and the well-established concept of legal availability. *See* 1 GAO Redbook at 4-6. Legal availability does not depend on the appropriation of funds sufficient to cover all similar expenditures. The GAO Redbook does not ask whether total obligations and expenditures are within congressionally established limits, it asks whether "the obligation and expenditure" at issue is "within the amounts Congress has established." *Id.* The Court's acceptance of the Cherokee Nation's understanding of appropriations law strongly supports this construction: "as long as Congress has appropriated *sufficient legally unrestricted funds to pay the contracts at issue*, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations.'" *Cherokee*, 543 U.S. at 637 (emphasis added).

Newport News illustrates this point. That case considered the amount that was legally available for construction of a certain ship, the DLGN 41. The Navy requested $152.3 million for the ship, and $92 million for a second ship, the DLGN 42. *Newport News*, 55 Comp. Gen. at 816. Congress appropriated the full amount, $244.3 million, without specifying the breakdown between the two ships. *Id.* The Navy subsequently authorized an expenditure of $30.4 for the DLGN 42. *Id.* Despite the apparent intent of subdividing the expenditure between the two ships, and the fact that the Navy had already authorized a portion of the funds to be used on the DLGN 42, the Comptroller General held that the

entire $244.3 million was legally available for the DLGN 41. *Id.* at 821.

This result could not have occurred if the concept of legal availability depended on the sufficiency of an appropriation to cover all expenditures authorized by it; money spent on the DLGN 42 obviously cannot also be spent on the DLGN 41. But the federal courts have consistently guarded the integrity of the federal contracting system by holding that the insufficiency of a multi-contract appropriation to pay all contracts does not relieve the government of liability if the appropriation is sufficient to cover an individual contract. *See Ferris*, 27 Ct. Cl. at 546; *Dougherty*, 18 Ct. Cl. at 503.

B

The Federal Circuit, recently considering the same issue we confront, concluded that a plaintiff in the same position as Ramah, the Arctic Slope Native Association ("ASNA"), could not recover unpaid CSCs because the "availability of funds provision coupled with the 'not to exceed' language limits the Secretary's obligation to the tribes to the appropriated amount." *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010).[10] The court recognized the plaintiff's argument that the government's liability remained "because the total appropriation is sufficient to satisfy the obligation to the [plaintiff], even though insufficient to satisfy the combined obligations to all the tribes," *id.* at 1303, but as the foregoing quote demonstrates, it nevertheless analyzed the issue as the Secretary's ability to pay *all* contrac-

[10] Following publication of this opinion, we requested supplemental briefing from the parties.

tors, discussing only the "Secretary's obligation to the *tribes*," *id.* at 1304 (emphasis added).

Rather than answering the question of whether the availability of appropriations must be considered from the perspective of individual tribes and tribal contractors, the Federal Circuit's analysis presumes from the outset that the answer is no. The court distinguishes *Cherokee* on the ground that "here there is a statutory cap and no ability to reallocate funds." *Arctic Slope Native Ass'n*, 629 F.3d at 1304. But this assertion only begs the question. Although it is true that the Secretary cannot reprogram funds from a more general appropriation once the CSC funding cap is reached, it is equally true that the Secretary was empowered to fund all of ASNA's CSCs by reallocating away from other contractors. In the same vein, the court concluded that the appropriations were not available to ASNA because "the appropriated amount has been paid to the tribes." *Id.* But ASNA's full CSC need was legally available to be paid from the relevant appropriations. Whether those funds were paid to "the tribes" does not tell us whether ASNA was entitled to payment.[11]

The Federal Circuit briefly discusses the ISDA's statement that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization." *Arctic Slope Native Ass'n*, 629 F.3d at

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[11] The dissent replicates this error. It would hold that Ramah's contractual obligation depends on "the availability of *sufficient* appropriations to pay for contract support costs on *all* the Secretary's ISDA contracts." (Dissenting Op. 28 (emphasis added).) But this is precisely the theory of "mutual self-awareness among tribal contractors" rejected in *Cherokee*. 543 U.S. at 640.

1304 (quoting 25 U.S.C. § 450j-1(b)). But the court does not grapple with the logical impossibility of complying with this provision in the event of insufficient funding. *See Arctic Slope Native Ass'n*, 629 F.3d at 1304-05. Regardless of the manner in which the Secretary chooses to allocate less than full CSC funding among the tribes and tribal contractors, some tribes will be paid at the expense of others. *See Ramah Navajo Sch. Bd.*, 87 F.3d at 1354 (Silberman, J., dissenting). That is, the plaintiffs' preferred allocation method and the government's pro rata method result in exactly the same level of compliance with § 450j-1(b).

Arctic Slope Native Association also attempts to distinguish *Ferris* because the *Ferris* contract did not include a "subject to the availability of appropriations clause." *Arctic Slope Native Ass'n*, 629 F.3d at 1303-04. The Federal Circuit concluded that this clause was inserted into contracts to overcome the rule of *Ferris*. *Arctic Slope Native Ass'n*, 629 F.3d at 1303. This conclusion is curious in light of the Supreme Court's repeated citations to *Ferris* in *Cherokee*. *See* 543 U.S. at 637, 640, 641, 643. In particular, we cannot square the Federal Circuit's conclusion with the Court's reliance on both *Ferris* and *Lincoln* for the proposition that "if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds." *Cherokee*, 543 U.S. at 641 (quotation omitted, citing *Lincoln*, 508 U.S. at 192; *Ferris*, 27 Ct. Cl. at 546). By citing *Lincoln*'s discussion of unfettered agency discretion in allocating an appropriation among objects for which an appropriation is legally available, 508 U.S. at

192, and *Ferris*'s rule that a "contractor who is one of several persons to be paid out of an appropriation" cannot have "his legal rights . . . affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects," 27 Ct. Cl. at 546, the Court strongly suggested that the Ferris rule applies to lump sum appropriations even if the contracts for which the appropriation is legally available contain "subject to the availability of appropriations" clauses.[12]

Finally, we note that *Arctic Slope Native Association* suggested a third potential general rule regarding the effect of "subject to the availability of appropriations" clauses with respect to lump-sum appropriations. *See Arctic Slope Native Ass'n*, 629 F.3d at 1305 n.8. The court cites *Winston Bros. Co. v. United States*, 130 F. Supp. 374 (Ct. Cl. 1955), a Court of Claims trial court decision which held "where the agency authorized to spend the appropriation allocates the funds on a rational and non-discriminatory basis and they prove insufficient, the Government is not liable for harm resulting from the shortage." *Id.* at 380. Under this interpretation, an agency's disbursement of a lump-sum appropriation could render an appropriation unavailable, but only if the agency's allocation is not irrational or discrimina-

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[12] One other circuit decided the issue presented in the same manner as the Federal Circuit. *See Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996). And the Federal Circuit previously held consistently with *Arctic Slope Native Association*. *See Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999). Both of these prior cases, however, predate *Cherokee*, and neither mentions *Ferris*. Because neither case contains a persuasive analysis of *Cherokee* or *Ferris*, which are strongly probative if not controlling, and because the reasoning in those cases is very similar to that of *Arctic Slope Native Association*, we do not address them separately.

tory. But as the Federal Circuit seemed to recognize, *Arctic Slope Native Ass'n*, 629 F.3d at 1305 n.8, such an interpretation is flatly inconsistent with *Lincoln*'s holding that an agency's discretionary allocation of a lump-sum appropriation is non-reviewable. 508 U.S. at 191-92.

V

For the foregoing reasons, we conclude that a "subject to the availability of appropriations" clause frees the government of liability only when congressional decisions standing alone—not discretionary agency actions—make funds unavailable for a specific contract. As the *Cherokee* Court made clear, we must be hesitant to stray from the usual definition of "subject to the availability of appropriations" without very good reason. It is "important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services." *Cherokee*, 543 U.S. at 644. Nevertheless, in exceptional cases, courts have given the phrase unique import. In *Blackhawk Heating & Plumbing Co. v. United States*, 224 Ct. Cl. 111 (1980), the court was faced with one such "convincing argument for a special, rather than ordinary, interpretation," *Cherokee*, 543 U.S. at 644.

In *Blackhawk*, the government and plaintiff entered into a settlement agreement intended to resolve disputed claims with respect to the construction of a Veterans Administration hospital. 224 Ct. Cl. at 115-16. As is common, the government's obligation was made "contingent upon the availability of appropriated funds from

which payment in full can be made." *Id.* at 118. Unlike the case at bar, however, the government presented substantial evidence regarding the negotiation of the agreement, and the parties' understanding of specific terms. The parties and their attorneys engaged in several discussions of the above-quoted contingency, and at the execution of the settlement agreement, the government's attorney explained that "if there were an affirmative action by the Congress that would prevent the Administrator from paying," the government's obligation would not attach. *Id.* at 120. The plaintiff shrugged and signed the agreement. *Id.* Later, Congress did take affirmative action to prevent payment of a portion of the settlement agreement. *Id.* at 123. Based on the powerful parol evidence of the parties' intent, the court interpreted the ambiguous contingency term to free the government from liability. *Id.* at 134.

In *Arctic Slope Native Association*, the Federal Circuit cited another case in which a court deviated from the traditional rule: *C. H. Leavell & Co. v. United States*, 530 F.2d 878 (Ct. Cl. 1976). *See Arctic Slope Native Ass'n*, 629 F.3d at 1303. That case considered a contract with a lengthy appropriations condition that, like *Blackhawk*, may have provided a reason to stray from the general rule. The contract at issue in *C. H. Leavell* contained a subsection (b) indicating that "[f]rom funds heretofore appropriated, the sum of $ 75,000.00 is available for payments to the Contractor." 530 F.2d at 894. It further stated:

> [if] it becomes apparent to the Contracting Officer that the balance of this allocation and any allocation for this and any subsequent fiscal years during the period of this contract is less than that required to

> meet all payments due and to become due the Contractor because of work performed or to be performed under this contract, the Contracting Officer may provide additional funds for such payments if there be funds available for such purpose. The Contractor will be notified in writing of any additional funds so made available. However, it is distinctly understood and agreed that the amount of funds stated in (b) above is the maximum amount the Government insures will be available during the current fiscal year and the Government is in no case liable for payments to the Contractor beyond this amount prior to having notified the Contractor in writing of any additional funds that can be made available. Accordingly, no progress schedule will be approved . . . which contemplates progress requiring funds in excess of the amounts stated to be available in (b) above for the current fiscal year and no progress schedule will be approved for any ensuing fiscal year which contemplates progress requiring funds in excess of the amount allocated by the Contracting Officer from funds subsequently made available.

Id. The *C. H. Leavell* contract may have conditioned the contractor's entitlement on the discretionary decisions made by the contracting officer based on the repeated references to the officer's allocations. In this case, the government does not point to any language suggesting the plaintiffs agreed to be bound by the Secretary's choices.

Indeed, the government does not identify any compelling factors that would militate in favor of straying from the usual rule here. Nothing in the self-determination contracts or the AFAs that appear in the

record unambiguously dictate the government's position; they merely repeat the phrase "subject to the availability of appropriations," or similar terms such as "subject to the availability of funding." One provision in the 2001 AFA requires Oglala to bill the BIA in an amount discounted by the actual CSC funding rate. But this provision is nothing more than an acknowledgment that the BIA would not provide full funding in that year, not an indication that the tribes were agreeing to limit the government's liability.[13]

The Ramah 2000 AFA is more illuminating. It includes an explicit acknowledgement that whether the tribe would receive funding for prior years' shortfalls was an open question. By 2000 and 2001, the Oglala and Ramah contractors knew the BIA would not pay their costs in full during the relevant fiscal year, but as a Ramah plaintiff representative explained by affidavit, her tribe "always understood that the contract amount represents an entitlement under the Self-Determination Act, even if payment is delayed until Congress makes the necessary appropriation." Unlike the shrug of the shoulders by the contractor in *Blackhawk*, Ramah has been vigorously shaking its head for over a decade now.[14]

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[13] Perhaps even this much cannot be read into the billing provision. The most logical reading is that it is simply referring to the 75 percent to be paid up front by the BIA, established earlier in the agreement. The earlier reference is followed by the promise that the "balance of funds will be added as soon as it becomes available subject to congressional appropriation."

[14] The dissent repeatedly suggests that the tribes knew or should have known that they would not receive full CSC funding. (Dissenting Op. 28, 29, 32.) The former contention is contradicted by tribal officials' statements in the record. The latter is unsupportable in light of the

The government also argues that *Cherokee* is distinguishable from this case and a "special" reading is required because Congress indicated its intent to underfund CSCs across the board. *See Cherokee*, 543 U.S. at 634 ("The Government refers to legislative history, but that history shows only that Executive Branch officials would have liked to exercise discretionary authority to allocate a lump-sum appropriation too small to pay for all the contracts that the Government had entered into; the history does not show that Congress granted such authority." (citation omitted)). The government contends that, here, the allocation of too small a lump-sum to fund all CSCs was an affirmative act by Congress indicating its intent to curtail full payment of valid CSCs. Although the legislative history suggests some congressional concern with the growth of CSCs,[15] *see* H.R. Conf. Rep. No. 103-299, at 28, the inference drawn by the government is too weak to overcome the strong preference for giving words a consistent meaning in order to ensure stability of government contracting. *See Cherokee*, 543 U.S. at 644; *Dougherty*, 18 Ct. Cl. at 503.

This is particularly true in light of the canons discussed *supra*. The traditional rule is that parties are presumed to contract with knowledge of existing law. *See, e.g., In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d 951, 959 (7th Cir. 2003); *Williams v. Stone*, 109 F.3d 890, 896 (3d Cir. 1997); *Storts v. Hardee's Food*

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principles of appropriations and contracts law discussed herein.

[15] For an investigation into the efficiency of tribal utilization of CSCs, see Bureau of Indian Affairs and National Congress of American Indians, Report of the BIA/Tribal Work Group on Tribal Need Assessment (June 1999).

Sys., Nos. 98-3285 & 98-3320, 2000 U.S. App. LEXIS 6307, at *45 (10th Cir. Apr. 6, 2000) (unpublished); *Gen. Accident Ins. Co. v. First Nat'l Bank & Trust Co. of Tulsa*, Nos. 90-5259 & 91-5009, 1993 U.S. App. LEXIS 26789, at *13 (10th Cir. Oct. 12, 1993) (unpublished). The reasonableness of the expectations of the parties must be viewed in light of the trust doctrine and the canon in favor of the tribes' construction, the *Ferris* rule, the traditional meaning of "legal availability," and the *Cherokee* Court's interpretation of identical language. We hold that the tribes' interpretation of the contracts and the statute is quite reasonable.

VI

Lastly, we address the government's appeal to the Appropriations Clause and the Anti-Deficiency Act. The Anti-Deficiency Act provides:

> An officer or employee of the United States Government . . . may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. . . .

31 U.S.C. § 1341(a)(1). The government claims that these provisions bar the Secretary from paying total CSCs, and that they strip the United States of liability to individual contractors above the contractor's pro rata share. We agree with the first proposition, but disagree with the second.

As to liability, the ISDA permits the Secretary to enter into self-determination contracts prior to Congress appropriating funds, although the contracts are made subject to the availability of appropriations. The statute explicitly provides that "[t]he Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof." 25 U.S.C. § 450f(a)(1). The ISDA further states that "the provision of funds under this Act is subject to the availability of appropriations." § 450j-1(b). The model contract portion of the ISDA, § 450*l*, indicates that self-determination contracts "become effective upon the date of the approval and execution by the Contractor and the Secretary," and repeats the "[s]ubject to the availability of appropriations" language with respect to funding amount. *Id.* (model contract § (b)(2), (4)).

Reading these provisions together, it is clear that the Secretary is "authorized by law" to "involve [the] government in a contract or obligation for the payment of money before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B). The "subject to the availability of appropriations" language would be rendered meaningless unless the contract was signed prior to congressional appropriations. Of course, the United States' liability is made contingent upon the availability of appropriations, but as discussed above, that condition was satisfied in each of the years at issue because Congress appropriated enough funds to pay CSCs on any individual contract. *See* Part IV, *supra*.

We agree with the government that the appropriations bills prohibit the Secretary from paying the sum

total of all CSCs from the agency appropriations. But the United States' liability is not coterminous with the Secretary's ability to pay. As explained in *Dougherty*, the Anti-Deficiency Act restrains "the official, but [it does] not affect the rights in this court of the citizen honestly contracting with the Government." 18 Ct. Cl. at 503 (citing the original Anti-Deficiency Act, Rev. Stat. § 3679).

This brings us to the Appropriations Clause, which states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. 1, § 9, cl. 7. If the plaintiffs' CSCs cannot be paid from the annual agency appropriations, the government argues, how can plaintiffs collect without violating the Appropriations Clause? The answer is straightforward: By recovering from the Judgment Fund established pursuant to 31 U.S.C. § 1304. *See* 25 U.S.C. § 450m-1(d) (Contracts Disputes Act applies to self-determination contracts); 41 U.S.C. § 612 (a) (judgments arising under Contract Disputes Act paid from Judgment Fund).

The government contends that Congress could not have intended this inefficient system of compensation. On one level, it is true that Congress likely did not intend to pay CSCs from the Judgment Fund. But we must consider the legal effect of Congress' intentional acts, and those acts compel the result. Congress passed the ISDA, guaranteeing funding for necessary CSCs, and its appropriations resulted in an on-going breach of the ISDA's promise. The Court in *Cherokee* recognized the possible remedy urged by plaintiffs, noting that agencies faced with insufficient appropriations must sometimes exhaust the appropriation and "leav[e] the

contractor free to pursue appropriate legal remedies [including the Judgment Fund] arising because the Government broke its contractual promise." 543 U.S. at 642-43 (citations omitted).[16]

This result leaves Congress with several options to avoid liability. *See* U.S. Gen. Accounting Office, Indian Self Determination Act: Shortfalls in Indian Contract Support Costs Need to be Assessed 54-63 (1999) (discussing potential congressional solutions to the CSC shortfall dilemma). Congress can revise the ISDA to remove the guarantees of full CSC funding contained in 25 U.S.C. § 450j-1(a)(1) and (g). *See N.Y. Airways, Inc. v. United States*, 177 Ct. Cl. 800, 808 (1966) (cited with approval in *Cherokee*, 543 U.S. at 642) (Congress could avoid liability caused by insufficient appropriations "by changing the substantive law under which the [contractual obligation was set], rather than by curtailing appropriations"). Alternatively, Congress could limit appropriations on a contract-by-contract basis. *See Dougherty*, 18 Ct. Cl. at 503 ("[W]hen one contract on its face assumes to provide for the execution of all the work authorized by an appropriation, the contractor is bound to

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[16] The government also argues that the Judgment Fund is not an appropriate remedy because the Secretary will be required to reimburse the fund for any judgment resulting from a self-determination contract. But this argument ignores the full text of the reimbursement provision, which requires an agency to reimburse the fund "out of available funds *or by obtaining additional appropriations for such purposes*." 41 U.S.C. § 612(c) (emphasis added); *see also* 2 GAO Redbook at 6-41 to 42 ("If an agency finds itself [unable to pay a contract], unless it has transfer authority or other clear statutory basis for making further payments, it has little choice but to seek a deficiency or supplemental appropriation from Congress, and to adjust or curtail operations as may be necessary." (footnote omitted)).

know the amount of the appropriation, and cannot recover beyond it. . . . "). What the government cannot do is breach its contractual obligations and avoid liability based on an improper reading of the phrase "subject to the availability of appropriations."[17]

VII

For the foregoing reasons, we **REVERSE** the grant of summary judgment in favor of the government and **REMAND** for further proceedings consistent with this opinion.

HARTZ, Circuit Judge, dissenting:

I respectfully dissent. There is much in the majority opinion with which I agree. And the result advocated by the government is not easy to swallow—the BIA hands over programs to tribal organizations but then does not reimburse the organizations for the full costs of running the programs. But in my view congressional intent is clear, all parties should have understood (and indeed did understand) that intent, and we must construe the contracts at issue in accordance with that understanding. The majority opinion's approach strikes me as too formalistic in relying on a sharp division between line-item and lump-sum appropriations. It renders futile the spending cap imposed by Congress. And to the extent that the majority opinion relies on *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), for support, it fails to explain why the Supreme Court found it necessary to ad-

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[17] Plaintiffs raise additional arguments, several of which are considered in the dissent. (*See* Dissenting Op. 12-15, 39-42.) Although we do not disagree with much of that discussion, we need not reach the remaining issues given our holding as to the meaning of the phrase "subject to the availability of appropriations."

dress in its opinion so many issues that would be irrelevant if the Court had embraced the view of government contracts that the majority opinion adopts.

I. BACKGROUND

The majority opinion provides a thorough discussion of the relevant statutory and administrative background. In this section I will focus on the statutory context and a few facts that illuminate the parties' necessary understanding of their contractual relationship.

First, beginning in fiscal year 1994, Congress set a maximum limit on how much the BIA could allocate from its budget for contract-support costs (termed "indirect costs" in that appropriations act, and "contract-support costs" thereafter). This was a change from prior-year appropriations, which had provided a designated amount for contract-support costs but had not prohibited the BIA from supplementing that amount with unrestricted funds available in the remainder of the appropriation to the BIA. (The appropriations-bill language at issue in *Cherokee Nation* was essentially the same as in the pre-1994 BIA appropriations.) Ordinarily, there would be no great difficulty in an agency's complying with such a spending cap. The agency could simply refuse to enter into more contracts than it had the money to pay for. But that course was unavailable to the BIA under the ISDA. If a tribal organization wished to take over an eligible program from the BIA, the BIA had to relinquish its control and fund the organization's takeover, except in quite limited circumstances. *See* 25 U.S.C. § 450f(a)(2).[1] And the BIA's contract with the tribal or

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[1] I should note, however, that for fiscal year 1999, Congress prohibited new or expanded ISDA contracts. *See* Pub. L. No. 105-277, § 328,

ganization to fund the program could not exclude contract-support costs. *See id.* § 450j-1(a). The congressional limitation on contract-support costs could therefore be effectuated by the BIA only by refusing to pay costs that would otherwise be mandated by statute. In other words, when Congress capped contract-support expenditures, it necessarily understood that the cap must override what would otherwise have been statutory commands to pay contract-support costs in full on each contract mandated by the ISDA.

Second, there was no secret that the BIA planned to pay only a portion of contract-support costs on each ISDA contract. As set forth in the majority opinion, some months after enactment of each of the relevant appropriations bills, the BIA would publish a notice in the Federal Register stating the amount of contract-support appropriations that it had received and explaining the allocation method should that amount be insufficient to pay for all contract-support costs negotiated in its ISDA contracts. The notice for fiscal year 1994 also forecast the magnitude of the potential shortfall in contract-support funding:

> Using FY 1993 experience which resulted in a total CSF [contract-support fund] need of approximately $85,000,000, we project a shortfall of at least $10,000,000 in FY 1994 and possibly a shortfall as high as $25,000,000. It is important to restate that the Bureau can only utilize the amount appropriated for the CSF account to meet indirect cost needs. That is, the Bureau can no longer reprogram funds from other Bureau accounts to cover CSF shortfalls.

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112 Stat. 2681, 291-92.

58 Fed. Reg. at 68694. Notices in later years did not project the amount of shortfalls; but their language (indeed, their very purpose) warned tribal organizations of the possibility of insufficient funding.

All notices described essentially the same method for distributing contract-support funds in the event of a shortfall. A specified sum (or nothing at all, *see* 64 Fed. Reg. at 2659 (fiscal year 1999)) was set aside for new or expanded contracts; such contract-support funds were usually to be distributed on a first-come, first-served basis. *See, e.g.*, 62 Fed. Reg. at 1470 (fiscal year 1997). For ongoing or existing contracts, in the event of a shortfall "the amount available shall be distributed pro rata, so that all contractors and compactors receive the same percentage share of their reported need." 66 Fed. Reg. at 15276 (fiscal year 2001).

The notices further advised that the BIA would not distribute the tribal organizations' final contract-support payments until about July 31, well after they were supposed to have begun performance under their contracts.[2] In practice, the tribal organizations often were not told precisely how much each would be paid in contract- support funds until late September. Between fiscal years 1994 and 2001, the tribal organizations were paid 77% to 92% of their contract-support costs.[3]

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[2] *See, e.g.*, 59 Fed. Reg. at 55318 (fiscal year 1995); 63 Fed. Reg. at 5399 (fiscal year 1998); 66 Fed. Reg. at 15276 (fiscal year 2001). *But see* 58 Fed. Reg. at 68694 (notice for fiscal year 1994, stating that the final distribution of contract-support funds will be made "around May 1").

[3] It is worth noting that even if there had been no statutory cap on contract-support costs, full payment would likely not have been made until well after performance of the contract had begun. The contract-support costs were typically expressed as a percentage of an agreed-on

The AFAs recognized that contract-support costs might not be fully paid. Although the template for AFAs may have changed over the years and the AFAs in the record may not be representative in various respects, they are illustrative of how tribal organizations and the BIA dealt with the tentativeness of contract-support funding. The Oglala AFA for calendar year 2001 is quite explicit. Its section entitled "Program and Budget" includes the following paragraph:

> Contract Support Funds shall be provided by the Bureau of Indian Affairs, *subject to the availability of funding*, in accordance with the Indirect Cost Negotiation Agreement between the Contractor and the

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base amount rather than in dollar terms. The percentage—called the indirect-cost rate—was negotiated with the Inspector General of the Department of the Interior. *See* 25 U.S.C. § 450b(g) ("'indirect cost rate' means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency"); S. Rep. No. 100-274, *as reprinted in* 1988 U.S.C.C.A.N. at 2628 ("Tribal indirect cost rates are negotiated and approved according to OMB guidelines by the Department of Interior Office of Inspector General."). The product of that rate and the base amount is intended to be the best approximation of what the indirect contract-support costs are. *See* 2 C.F.R. pt. 225 (OMB Guidelines). The negotiation to establish the indirect-cost rate was ordinarily conducted after execution of the AFA. Ramah's controller explained:

> Our indirect cost rates are usually not determined by agreement until well after the commencement of the federal fiscal year and sometimes not until after it is concluded. The principal reason is that indirect cost proposals must be accompanied by single agency audits for the year ending two years prior to the fiscal year for which the application is being made. However, in practice it has proven impossible for us to finalize our audits prior to the commencement of the federal fiscal year in question.

J. App., Vol. II at 266—67.

> Office of the Inspector General, and in accordance with Bureau of Indian Affairs policies and procedures pertaining to the distribution of Contract Support Funds.

J. App., Vol. IV at 900 (emphasis added). A paragraph entitled "Billings for Indirect Cost" in the "Administration Data" section explicitly recognizes that Oglala may be reimbursed for only a percentage of the indirect contract-support costs computed by using the indirect-cost rate. It states:

> The contractor shall bill for Indirect Cost earned on his voucher\invoice showing the following, for the period covered by the voucher\invoice:
>
> 1. Total direct cost expenditures.
>
> 2. Less Exclusions.
>
> 3. Times Indirect Cost Rate.[1]

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[1] The preceding paragraph, which is entitled "Negotiated Indirect Cost Rates," describes how the parties are to arrive at a rate:

> 1. The allowable indirect costs under this contract shall be obtained by applying negotiated indirect cost rates to bases agreed upon by the parties, as specified below.
>
> 2. Negotiation of indirect cost rates by the Contractor and the cognizant audit agency shall be undertaken as promptly as practicable after receipt of the Contractor's indirect cost proposal.
>
> 3. Allowability of cost and acceptability of cost allocation methods shall be determined in accordance with OMB Circular A-87.
>
> 4. The results of each negotiation shall be set forth in an Indirect Cost Negotiation Agreement, such agreement shall become a part of this contract by reference. The agreement shall specify:
>
> (a) The agreed indirect cost rate(s);
>
> (b) The base to which to the rate(s) apply;

4. *Times percentage of rate funded by BIA.*

5. Indirect Cost earned for the period covered. (1)-(2) X (3) X (4) = (5).

Id. at 920 (emphasis added). In other words, the full amount of indirect contract-support costs will be reduced by multiplying it by a "percentage of rate funded by BIA." This computation follows the same steps as those for indirect-contract-support-cost computations set forth in the BIA's notice of "Distribution of Fiscal Year 2001 Contract Support Funds." *See* 66 Fed. Reg. at 15276.

Not only were the tribal organizations on notice that contract-support costs may not be fully funded, but their representatives may even have acquiesced in the shortfall, recognizing that in light of limited willingness of Congress to fund programs benefitting Native Americans, other needs should take priority over contract-

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(c) The periods for which the rate(s) apply; and,

(d) The specific items treated as exclusions or any changes in the items previously agreed to be treated as exclusions.

5. The Contractor is to be reimbursed for all allocable and allowable indirect costs incurred in performance of this contract, subject to any statutory limitations applicable.

6. Any failure by the parties to agree on any indirect cost rate(s) or applicability of the rate(s) to the bases under this provision shall be considered a dispute concerning a question of fact for decision by the Awarding Official within the meaning of the clause of the contract entitled "Disputes".

J. App., Vol. IV at 919-20. The indirect-cost rate is not an issue in this appeal.

support costs. A study by the GAO reported that there were two reasons for underfunding contract-support costs:

> First, it is difficult for [the BIA and the Indian Health Service] to predict what the total need for indirect cost funding will be in advance. The agencies do not know which tribes will be contracting which programs, at what level the contracted programs will be funded, and what a tribe's indirect cost rates will be. Second, in addition to the difficulty of predicting the future contract support requirements, the agencies have had other funding priorities in recent years. For example, BIA's priorities have been to seek additional appropriations for law enforcement to reduce crime on the reservations and for Indian education.

J. App., Vol. III at 541. Those priorities are to be set after consultation with the Native American community. *See* 25 U.S.C. § 450j-1(i) ("On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the . . . Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress . . .).").[5]

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[5] It is also worth noting that the contracts give tribal organizations the right to suspend performance if they become insecure about payment:

> The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this

Another good indication that everyone understood, or should have understood, that the appropriations cap would require reductions in contract-support payments in all the BIA's ISDA contracts can be found in a brief submitted some 16 years ago by one of the law firms representing Plaintiffs in this appeal. In *Ramah Navajo School Board., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), the school board successfully challenged how the Secretary of the Interior apportioned to the tribes the restricted contract-support appropriations for fiscal year 1995. (The plaintiffs in that case did not challenge, as in this case, the failure to pay full contract-support costs.) The Secretary had set a June 30, 1995, deadline for submitting proposals for indirect-cost rates. Tribal organizations that missed the deadline would receive only 50% (instead of 75%) of full funding on the first round of distribution. *See* 59 Fed. Reg. at 55318 (fiscal year 1995). In the second round the remaining funds would be apportioned pro rata to the deadline-compliant tribal organizations, who ultimately received more than 90% of full funding. *See Ramah Navajo Sch. Bd.*, 87 F.3d at 1343. The brief submitted by counsel for the school board asserted: "Congress in the [ISDA] and the contemporaneous appropriation statutes clearly intend-[ed] an even, across-the-board reduction in all tribal contracts in the event of an appropriations shortfall."

Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

25 U.S.C. § 450*l*(c) (Model Agreement § 1(b)(5)).

Appellant's Brief at 27, *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, Nos. 95-5334, 95-5348) (D.C. Cir. Nov. 15, 1995) (footnote omitted).

II. ANALYSIS

Given the obvious intent of Congress, which was communicated by the BIA to tribal organizations receiving ISDA funds and was surely understood by them, affirmance of the district court is required unless some legal doctrine overrides congressional intent. In my view, however, the governing doctrine confirms the need for affirmance.

A. Congressional Appropriations and Government Contractual Liability

The Appropriations Clause of the United States Constitution states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. 1, § 9, cl. 7. To prevent the Executive from forcing its hand by incurring contractual debts on behalf of the United States, Congress has enacted the Anti-Deficiency Act which, with certain limited exceptions, prohibits federal agencies from contracting for more than what Congress appropriates. *See* 31 U.S.C. § 1341(a)(1)(A), (B). The Act states in part:

An officer or employee of the United States Government . . . may not—

> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]

> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. . . .

Id. § 1341(a)(1). Consequently, government contracts generally are not binding until Congress appropriates the necessary funds. *See Cherokee Nation*, 543 U.S. at 643.

On occasion, however, a law may grant a government officer or employee what is known as "contract authority"—that is, the authority to enter into a contract that is binding regardless of whether Congress appropriates sufficient money to cover the contract. *See Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975); *see generally* I General Accounting Office, Principles of Federal Appropriations Law p. 2-6 (3d ed. 2004) (GAO Redbook). In that event, if the appropriation turns out to be inadequate, the contractor can sue the government for underpayment. *See* GAO Redbook at p. 2-7. A grant of contract authority, however, must be clear. As stated in 31 U.S.C. § 1301(d): "A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made."

Plaintiffs make two principal arguments in support of their claim to full payment of ISDA contract-support costs: They assert (1) that the Secretary had contract authority to bind the government to pay contract-support costs regardless of the sufficiency of appropriations, and (2) that even if the Secretary lacked contract authority, the congressional appropriation for contract-

support costs was sufficient for each separate contract, so that the government is bound even if there were insufficient funds to pay the total of such costs for all ISDA contracts. I first address contract authority.

B. Did the BIA have Contract Authority for Contract-Support Costs?

Plaintiffs contend that Congress granted the Secretary contract authority to enter into ISDA contracts when it directed the Secretary to pay in full the contract-support costs on ISDA contracts (regardless of the adequacy of appropriations for those costs). They acknowledge the following language of 25 U.S.C. § 450j-1(b) that limits the provision of funds to what is appropriated:

> *Notwithstanding any other provision in this subchapter* [the entire ISDA], *the provision of funds under this subchapter is subject to the availability of appropriations* and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

(Emphasis added). They argue, however, that this language does not limit the government's financial obligation for contract-support costs.

To begin with, Plaintiffs remind us that the ISDA's legislative history reflects congressional intent that tribes not be penalized by government underpayment of contract-support costs. *See* S. Rep. 100-274, *as reprinted in* 1988 U.S.C.C.A.N. at 2628 ("the Committee believes strongly that Indian tribes should not be forced

to use their own financial resources to subsidize federal programs."). They then point to two ISDA provisions suggesting a categorical government obligation. The first is § 450j-1(a)(2), which states:

> There *shall* be added to the amount required by paragraph (1) [(the Secretarial amount)] contract support costs which *shall* consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> > (A) normally are not carried on by the respective Secretary in his direct operation of the program; *or*
> >
> > (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(Emphases added). The other is § 450j-1(g) (added to the ISDA six years after enactment of the subject-to-availability language of § 450j-1(b)), which speaks of contract-support costs as an entitlement:

> Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is *entitled* under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(Emphasis added).[6] *In light of this mandatory language,* Plaintiffs contend that the subject-to-availability restriction on "the provision of funds under this subchapter," § 450j-1(b), must limit only payments by the Secretary, not the government's ultimate liability. Under their construction of the statute, "*payment* of the full amount by the Secretary is subject to available appropriations to make those payments, but if such appropriations are not available then the underpaid contract *obligation* remains in place and the government remains liable in damages." Aplt. Br. at 49-50.

Plaintiffs' argument is interesting, but unpersuasive. They do not explain why there would be any reason to include in the ISDA a provision saying that the Secretary cannot pay out money that has not been appropriated. Such a provision would seem superfluous. If such payments are not barred by the Constitution's Appropriations Clause, then the Anti-Deficiency Act should do the trick. One could also wonder what good Congress

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[6] In addition, Plaintiffs rely on § 450j-1(d)(2), which states: "Nothing *in this subsection shall be construed to authorize the Secretary to fund* less than the full amount of need for indirect costs associated with a self-determination contract." But this provision explicitly applies only to subsection (d) of § 450j-1. *See id.* § 450j-1(d)(1) ("Where a tribal organization's allowable indirect cost recoveries are below the level of *indirect costs that the tribal organizations should have received for any* given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to *any future years' indirect cost rate or amount for such tribal organization*, nor shall any agency seek to collect such shortfall from the tribal organization."). The provision does not purport to have any effect on the subject-to-availability language of § 450j-1(b). Thus, I fail to see any relevance of § 450j-1(d)(2) to the present dispute.

thought it would accomplish by restricting payments by the Secretary but not the liability of the government. The effect on the overall federal budget would be the same whether the money comes from the Secretary's budget or from the fund used to pay judgments for the government's breach of contractual duties. *See* 31 U.S.C. § 1304 (judgment fund). When Congress says that "the provision of funds under this subchapter [the ISDA] is subject to the availability of appropriations," 25 U.S.C. § 450j-1(b), it must mean that the government's *obligation* on ISDA contracts is limited by the amount appropriated.

As for the addition of § 450j-1(g) several years after enactment of the subject-to-availability language in § 450j-1(b), if subsection (g) were intended to limit the reach of that language in subsection (b), one would expect Congress to have been explicit about it, as required by 31 U.S.C. § 1301(d) (contract authority must be "specifically state[d]"). Yet Congress did not bother to amend § 450j-1(b) to say that the subject-to-availability provision that otherwise applies to the entire ISDA does not apply to contract-support costs.

Most importantly, Plaintiffs' construction of the subject-to-availability provision is contrary to the Supreme Court's view. Referring to § 450j-1(b), *Cherokee Nation* said:

> Language of this kind is often used with respect to Government contracts. This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates

> funds for that year. *It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.*

543 U.S. at 643 (citations omitted; emphasis added). I therefore conclude that the Secretary did not have contract authority to bind the government to pay full contract-support costs regardless of the adequacy of appropriations.

I now turn to Plaintiffs' argument that there were available funds to pay each tribal organization's contract-support costs in full.

C. Were Funds Available for Full Payment of Contract-Support Costs?

Plaintiffs' principal argument is not predicated on the Secretary's alleged contract authority to bind the government to pay contract-support costs in full. Rather, they contend that sufficient appropriations were "available" to pay each individual tribal organization's contract-support costs in full, so the government cannot escape liability by relying on the insufficiency of appropriations to pay the total of such costs for all tribal organizations. Aplt. Br. at 1.

Before addressing the decisions relied upon by Plaintiffs, I would note two classic Supreme Court opinions on the enforceability of unfunded contracts. They establish that a contractual subject-to-availability provision ordinarily forecloses recovery of otherwise promised payment in excess of appropriations; that is, by agreeing that payment is subject to the availability of appropria-

tions, the contractor accepts the risk of congressional underfunding.

Bradley v. United States, 98 U.S. 104 (1878), concerned the lease of a building for government use. In accordance with statutes barring federal agencies from entering into contracts for amounts exceeding appropriations, *see id.* at 107-08, the three-year lease stated that it was "subject to an appropriation by Congress for the payment of the rental herein stipulated for, and that no payment shall be made to [Bradley] on account of such rental until such appropriation shall be available," *id.* at 105-06 (internal quotation marks omitted). During the first two full years of the lease term, Congress appropriated $4,200, the full contract price, specifically for the lease; but in the last year it appropriated only $1,800. See *id.* at 108 (the first-year appropriation also included rental for the first three weeks of the lease, which were in the prior fiscal year). The Court rejected the claim for the balance by Bradley's successor. It said that the parties' intent, as evidenced by the lease's availability provision, was that the lessor would not be paid until appropriations became available. *See id.* at 112. That provision placed the underfunding risk on the lessor:

> Public officers, . . . having no funds in the treasury and being without authority to bind the United States, can only agree to pay the stipulated rental, provided the money is appropriated by Congress, and if the lessor, voluntarily and without any misrepresentation or deception, enters into a lease on those terms, he must rely upon the justice of Congress.

Id. at 117.

Sutton v. United States, 256 U.S. 575 (1921), teaches a similar lesson. The government contracted with the Hillsboro Dredging Company (whose assets were later assigned to Sutton as bankruptcy trustee) to conduct dredging and excavation work for a harbor-improvement project. *See id.* at 577. Hillsboro was to be paid at unit rates. *See id.* Congress appropriated $23,000 for the project. *See id.* "The appropriation was ample to defray the cost at [the agreed-on unit] rates, assuming that the quantities of material to be removed did not greatly exceed the estimates presented by the specifications." *Id.* A statute limited the government's contractual obligations to the amount of appropriations. *See id.* at 579 ("'No act of Congress hereafter passed shall be construed to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed.'" (quoting 34 Stat. 697, 764 (1906); ellipses omitted)). Accordingly, the contract provided that "within the limits of available funds the United States reserves the right to require the removal of such yardage as will complete the work, be it more or less than the quantities above estimated." *Id.* at 577 (ellipses and internal quotation marks omitted). When it was discovered that the government inspector had underestimated the amount of work performed, work was halted. *See id.* But by that time the amount owed at unit rates substantially exceeded the congressional appropriation. *See id.* Sutton sued for the balance. *See id.* at 578. The Court held that "the contractor cannot recover for work done in excess of the appropriation." *Id.* at 581. "The Secretary of War was . . . without power to make a contract binding the government to pay more than the amount

appropriated. Those dealing with him must be held to have had notice of the limitations upon his authority." *Id.* at 579.

Plaintiffs argue that *Bradley* and *Sutton* are distinguishable because they concern only "restricted single-purpose appropriations" in which Congress has "designate[d] a specifically-appropriated sum for a given undertaking." Aplt. Br. at 28. This case, they say, concerns instead a "lump-sum appropriation[]," *id.*, which, although "capped at some level," is "without limitation available for multiple projects or contractors . . . and is thus 'unrestricted,'" *id.* at 30. They contend that "[i]n the lump-sum situation . . . , an agency's exhaustion of an appropriation without fully paying the contract at issue . . . does not bar the contractor from recovering damages for the non-payment." *Id.* at 26-27 (emphasis omitted). In other words, "the government may be held liable for failing to pay a contractor in full out of an appropriation sufficient to pay that contractor, even though the appropriation is insufficient to pay all of the contracts the agency has made." *Id.* at 27.

For support of their position, Plaintiffs rely in part on the Supreme Court's decision in *Cherokee Nation*, 543 U.S. 631, which awarded the plaintiffs in that case their full contract-support costs for ISDA contracts with the Secretary of Health and Human Services (HHS). I will discuss *Cherokee Nation* more fully later. For now, suffice it to say that the holding in that case is not helpful to Plaintiffs' argument. True, the contracts were, as here, subject to the availability of appropriations. *See id.* at 640-41. And, as here, the government argued that Congress did not appropriate enough money to cover the full contract-support costs for all ISDA contracts. *See*

id. at 636. But unlike our case, the appropriations acts had not used restrictive not-to-exceed language with respect to contract-support costs. (The acts were like the pre-1994 BIA appropriations acts.) Thus, the HHS Secretary's contract-support spending was not statutorily restricted. And because there were sufficient unrestricted funds (in addition to the funds specifically appropriated for contract-support costs) available to cover the contract-support costs on the HHS Secretary's ISDA contracts with the plaintiffs, the Court held that the subject-to-availability provision did not limit the government's liability. *See id.* at 643 ("Since Congress appropriated adequate unrestricted funds here, [the] phrase ['subject to the availability of appropriations'], if interpreted as ordinarily understood, would not help the Government."). To be sure, Plaintiffs here rely not just on the holding in *Cherokee Nation* but also on some of the Court's language regarding the government's liability on contracts paid for out of lump-sum appropriations. Before I turn to that language, however, it will be helpful first to analyze other relevant case law and to review the specific context of the dispute before us.

Most helpful to Plaintiffs is the holding in a lower-court decision cited with approval by *Cherokee Nation*. In summarizing propositions not disputed by the parties in that case, the Supreme Court cited *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892), for its statement that "[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." *Cherokee Nation*, 543 U.S. at 637-38. Plaintiffs argue

that under this *Ferris* doctrine, each tribal organization is entitled to full payment of its contract-support costs because the congressional appropriation for contract-support costs was many times greater than their individual amounts, and it is irrelevant to any particular tribal organization that the Secretary may have overcommitted the total appropriation by entering into other contracts. In my view, however, this argument takes *Ferris* too far.

Ferris considered a contract between the government and Ferris to dredge 100,000 cubic yards of material from the Delaware River. *See* 27 Ct. Cl. at 542-43, 545. When the contract was executed, the agency allotted to it $37,000 out of a congressional appropriation for improvement of the river. *See id.* at 542-43. But the government halted work when only 35,494 cubic yards of material had been removed because the appropriation had been exhausted. *See id.* at 545—46. Ferris was fully paid $9,500 for the work performed; but he sought lost profits for the work that he was prevented from performing by the order to stop. *See id.* at 543, 545-46. The court awarded him $6,510 in damages. *See id.* at 547. Exhaustion of appropriated funds, it explained,

> justified the officer in charge, but does not justify the [government] in not providing funds for carrying out and discharging [its] legal obligations. *A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.* An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a defi-

> nite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.

Id. at 546 (emphasis added).

This quoted proposition might appear to control the result here. After all, each tribal organization executing an ISDA contract would know that the congressional appropriation for contract-support costs was far more than sufficient to cover those costs for its own contract, and the organization would not be "chargeable with knowledge of [the] administration [of that appropriation], nor c[ould] [its] legal rights be affected or impaired . . . by its diversion . . . to other objects." *Id.*

But one must not read too much into *Ferris*. It is, in essence, simply a case about contract interpretation. The legality of the contract was not at issue. Nor was there any doubt that the officer in charge was forbidden from making additional payments to Ferris once the appropriation was exhausted; the court noted that the officer was "justified" in stopping the work. *Id.* The sole question was the extent to which the government was bound on its contract with Ferris. To answer that question, courts follow the dictum that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (internal quotation marks omitted). Context, of course, is critical in interpreting contracts. What *Ferris* said is that in the circumstances of that case, where the

government contracted to pay for certain work and sufficient funds to pay for the work had been appropriated (and even allocated to the contract), then the contractor could take the contractual promise as binding; the contractor did not need to worry about whether the funds would be reallocated while it was performing the contract. This would have been a reasonable assumption by the parties; and ordinarily it would be a reasonable construction of such a contract even if it contained subject-to-availability-of-appropriations language. *See Cherokee Nation*, 543 U.S. at 637.

In other contexts, however, a court could properly interpret similar language differently. The effect of context is well-illustrated by the opinion of the Court of Claims in *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (1980), an opinion cited repeatedly by the Supreme Court in *Cherokee Nation*. It is worthwhile to describe *Blackhawk* in detail. The case concerned an agreement between the Veterans Administration (VA) and a contractor to resolve a dispute regarding cost overruns for construction of a hospital. *See id.* at 541. The parties settled on a compromise payment of $10.3 million. *See id.* The amount was to be paid in two installments: $8 million within 40 days of settlement, and $2.3 million within 90 days of settlement. *See id.* at 544. To pay the settlement, the VA needed to transfer ("reprogram") funds that had been earmarked for other projects. *See id.* at 542. This was done, and the VA then sent letters notifying some congressional committees (those involved in VA appropriations) of the reprogramming. *See id.* at 543. But several members of Congress, after reviewing a GAO report on the settlement, wrote to the VA expressing concern about the payments. *See*

id. at 544. When the VA decided to go forward with the settlement anyway, Congress enacted legislation retroactively barring any VA settlements exceeding $1 million absent an independent audit (which had not been prepared for the Blackhawk settlement), although the conference report on the legislation agreed that up to $6 million could be advanced on settlements that predated the law's effective date. *See id.* at 544-45. The law was enacted on January 3, 1974; and on the same day the VA paid $6 million of the initial $8 million installment required by the settlement, about three weeks after it was due. *See id.* at 543, 545. The VA made no further payments. *See id.* at 546.

Blackhawk sued the VA for the unpaid settlement amounts plus interest. *See id.* The lawsuit turned on the meaning of Article 8 of the agreement, which stated: "The Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment in full can be made." *Id.* at 542 (internal quotation marks omitted). The parties agreed on the meaning to some extent. They both thought that Article 8 at least made the agreement contingent on the VA's reprogramming funds initially earmarked for other construction purposes, although it was everyone's understanding that the contingency was highly likely to occur. *See id.* at 542-43, 546-47.

The VA contended, however, that Article 8 further limited its liability in two ways: (1) its obligation was contingent on approval of the reprogramming by congressional committees notified of it beforehand, *see id.* at 546-47, and (2) it was conditioned on there being no "affirmative action by the Congress that would prevent the [VA] from paying," *id.* at 550. After examining the

relevant statutory and regulatory framework, the parties' course of dealing, and communications between the parties, the court disagreed with the VA on the first limitation but agreed on the second.

In rejecting the VA's claim that Article 8 made payment to the contractors conditional on approval of reprogramming by the pertinent congressional committees, the court observed that no statute required such approval, no VA regulation stated that reprogramming would not go forward without congressional-committee consent, and no practice or policy of the VA prohibited unconsented-to programming. The court said that notification to the committees was merely a courtesy to maintain good relations with Congress. Moreover, it found that no one representing the VA had ever told Blackhawk that committee approval was necessary for reprogramming, and in none of the prior settlement agreements between Blackhawk and the VA had committee approval of reprogramming been raised as a consideration. *See id.* at 547-50.

As for the VA's contention that Article 8 made payment conditional on Congress's not acting to prevent payment, the court found the issue a close one, but sided with the VA. Crucial to this conclusion was evidence of what happened at the meeting to execute the settlement. At the meeting a VA attorney mentioned that Article 8 would limit the government's liability should Congress affirmatively prevent the agency from paying. *See id.* at 543. To this statement the contractor merely shrugged and said nothing. *See id.* The parties then signed the agreement. *See id.* The court said that the contractor's shrug "was both an acknowledgment of understanding and a dismissal of concern." *Id.* at 551.

The court's ultimate ruling gave each party a partial victory. Article 8 relieved the VA of liability on the second installment of $2.3 million, which came due after Congress enacted the legislation limiting the VA's settlement payments; but the VA remained liable on the balance of the first installment of $8 million because it came due before the legislative enactment, when the agency had funds available with which to pay. *See id.* at 552-53.

For present purposes, the lesson of *Blackhawk* is that the court did not confine its analysis to the abstract meaning of "contingent upon the availability of appropriated funds"; it construed the language in light of the relevant statutes and (nonexistent) regulations, the policies and practices of the agency, and the communications between the parties.

Adopting this perspective, I now turn to Plaintiffs' ISDA contracts. First, consider the statutory context. As discussed above, congressional enactments alerted tribal organizations to the likelihood of shortfalls. The appropriation for every pertinent year set an upper limit on what could be provided for contract-support costs. Whereas in *Ferris* the government presumably could have avoided overcommitting its limited appropriation by refusing to execute additional contracts, the Secretary had no such discretion. The ISDA requires the Secretary (1) to approve all tribal requests to execute ISDA contracts (unless certain narrow statutory grounds justify refusal), *see* 25 U.S.C. § 450f(a)(1), (2); and (2) to pay (subject to the availability of appropriations) the full amount of contract-support costs for each such contract, *see id.* § 450j-1(a)(2), (b). Because the amount of contract-support costs was thus a matter over which the

Secretary had essentially no control, the only purpose for capping those costs would be to reduce them below what would otherwise be required by the ISDA.

Moreover, the Secretary gave tribal organizations repeated official notices that the restricted appropriations for contract-support costs had not been adequate and were expected to be inadequate for full funding, so that contingency plans had been made regarding how to apportion funds if they turned out to be inadequate. An annual notice in the Federal Register advised that the BIA would need to determine whether the appropriated funds for contract support would suffice to pay contract-support costs for all ISDA contracts and, if not, the BIA would pay only a pro rata portion of the costs. Every contracting organization well knew that its contract-support costs had not been paid in full for the prior year; and the notices would have had scant purpose had the BIA expected the appropriation to be adequate. Thus, unlike Ferris, the tribal organizations knew what to expect. I am not saying that giving notice can by itself relieve an agency of an obligation to pay. If the money is there, the agency must pay, as in *Cherokee Nation*. Rather, the point is that if legislation precludes full payment, the contractor cannot rely on *Ferris* if the contractor has proper notice of the problem.

In short, even though a government contractor ordinarily may not be chargeable with knowledge of the administration of the appropriation that funds the contract, it cannot close its eyes to the clear implication of statutory funding restrictions, official information publicly promulgated on the subject, and the historical course of dealing. Whether an appropriation can be viewed as a line item or a lump sum is a relevant part of

the context, but only a part. Given the context here, a reasonable person construing the AFAs at issue would understand that the Secretary was promising to pay only the portion of contract-support costs that could be funded by the restricted congressional appropriation for such costs on all ISDA contracts. To be sure, ambiguities in contracts with Indian tribes should be resolved in favor of the tribes. *See* 25 U.S.C. § 450*l*(c) (Model Agreement § 1(a)(2)). But that rule does not apply here because of the clarity of the meaning of "subject to the availability of appropriations" in the present context. That language means that the government's contract-support-cost obligation is subject to the availability of sufficient appropriations to pay for contract-support costs on all the Secretary's ISDA contracts.

My view is supported by three opinions of two other circuits regarding the availability of contract-support costs in light of the not-to-exceed language in the appropriation acts. Two opinions predate *Cherokee Nation*; but I see nothing in them contrary to the Supreme Court's analysis. And what is most important about the decisions is not so much their ultimate conclusions as their construction of the legislation, which was what I have said would be the reasonable interpretation by a tribal organization entering into an ISDA contract with the BIA.

I have already mentioned *Ramah Navajo School Board*, 87 F.3d 1338. In that opinion the court interpreted the ISDA's subject-to-availability provision to mean that "each Tribe had a right only to the amount of CSF [contract-support funding] it would have received under a legal allocation plan." *Id.* at 1346. It then held that the allocation plan would be legal only if it were pro

rata for all tribal organizations. *See id.* at 1349. It found support in "[t]he legislative history of the 1995 Act[, which] indicates that Congress, aware that it had appropriated an insufficient amount for full CSF funding, intended for the agency to deal with the shortfall through a *pro rata* reduction." *Id.* I agree that organizations contracting with the Secretary would have understood that none of them would receive full contract-support-cost funding if the restricted appropriation was insufficient to pay full costs for all of them. And, as I said earlier, the plaintiffs in *Ramah Navajo School Board* so understood the law. *See* Appellant's Brief at 27, *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, Nos. 95-5334, 95-5348 (D.C. Cir. Nov. 15, 1995).

In *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999), the court addressed, and rejected, a claim seeking the same relief as in our case—full payment of contract-support costs despite a not-to-exceed appropriation and a subject-to-availability proviso. The plaintiff raised an estoppel argument, asserting that it had detrimentally relied on § 450j-1(g)'s entitlement language. But the court said that it was unreasonable for the plaintiff to expect full payment of indirect contract-support costs because the subject-to-availability provisos in § 450j-1(b) and the model contract unequivocally informed it otherwise. *See id.* at 1380.

The third opinion, of course, is *Arctic Slope Native Assn'n, Ltd. v. Sebellius*, 629 F.3d 1296 (Fed. Cir. 2010). In a thoughtful opinion by the court most conversant with federal contract law, the identical issue raised in this case was resolved in favor of the government.

In sum, I conclude that in the context of the appropriation statutes for the years in question, the ISDA, and the parties' course of dealing, the subject-to-availability language of Plaintiffs' ISDA contracts meant that the contract-support costs for each would need to be reduced if the appropriation for contract-support costs was inadequate to pay such costs on all ISDA contracts.

I disagree with Plaintiffs' contention that the *Cherokee Nation* opinion requires otherwise. In that case the plaintiffs successfully sued for full payment of their contract-support costs for ISDA contracts with the Indian Health Service (IHS) (under the HHS Secretary) for fiscal years 1994 through 1997. *See Cherokee Nation*, 543 U.S. at 634. Congress had appropriated between $1.277 billion and $1.419 billion each year for the IHS "to carry out" the ISDA. *Id.* at 637 (internal quotation marks omitted). "These appropriation Acts contained no relevant statutory restrictions," *id.*, in contrast to appropriations to the BIA for ISDA purposes during those years, which contained caps on contract-support funding.

As Plaintiffs read *Cherokee Nation*, it stands for the proposition that because the appropriation for contract-support costs was more than adequate to pay those costs for any particular tribal organization, the subject-to-availability requirement was satisfied for each individual contract and the government is liable. But, as I have previously noted, *Cherokee Nation* does not so hold. In that case the available funds sufficed to pay the total of contract-support costs for all contracts at issue.

I must acknowledge, however, that the *Cherokee Nation* opinion did endorse the general proposition (which, the Court observed, the government had not contested) relied on by Plaintiffs—that "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made." *Id.* Accordingly, said the Court, the government was bound in that case unless it could "show something special about the promises . . . at issue," *id.* at 638, keeping in mind the importance of "provid[ing] a uniform interpretation of . . . language [similar to 'subject to the availability of appropriations'], lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services," *id.* at 644.

But what compels a different outcome here is the presence of "something special," *id.* at 638, that was not present in *Cherokee Nation*—namely, the context discussed at length above to show that tribal organizations must have understood that caps in the appropriation acts could (and almost certainly would) require a percentage reduction in payment of contract-support costs. Recall that the ISDA does not give the Secretary discretion to refuse to enter into an ISDA contract or to refuse to pay contract-support costs. Thus, the language of the annual appropriations acts that set a limit on the funds available for contract-support costs could have no purpose other than to require underpayment of contract-

support costs in ISDA contracts. And because the Secretary could not beggar one tribal organization (by reducing its contract-support costs) to pay the full contract-support costs for another organization, *see* 25 U.S.C. § 450j-1(b) ("[T]he Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under [the ISDA]."), Congress must have contemplated a reduction for all tribal organizations. Indeed, if we were to apply to the present context the *Ferris* doctrine as interpreted by Plaintiffs, the dollar limitations in the appropriations acts would be empty gestures. Because the government would still owe full contract-support costs on each ISDA contract, the caps would be irrelevant. We should refrain from interpreting statutory language in a way that renders it impotent. *See Fed. Trade Comm'n v. Accusearch, Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009) ("Under a long-standing canon of statutory interpretation, one should avoid construing a statue so as to render statutory language superfluous." (internal quotation marks omitted)). I would adopt the more natural interpretation of the statutory scheme, which, as noted above, has been adopted in three other circuit opinions and even endorsed by the plaintiffs in one of the cases.

Moreover, *Cherokee Nation* does not preclude my interpretation. On the contrary, the discussion in that opinion of several arguments made by the government suggests that the Court was unwilling to endorse the rigid view of *Ferris* adopted by Plaintiffs here—namely, that so long as the appropriation for contract-support costs was greater than the amount of such costs in an individual ISDA contract, the subject-to-availability con-

dition is not triggered and the government is liable. If *Cherokee Nation* had, as Plaintiffs contend, embraced their view of *Ferris*, it would have been unnecessary for the Court to address those arguments by the government; after all, the *Ferris* doctrine, as understood by Plaintiffs, would have guaranteed the Cherokee Nation's victory regardless of the merits of the other arguments. It is therefore instructive to examine some of the grounds on which the Court rejected the government's arguments against applying the general *Ferris* rule in that case, because the things that the Court found missing in *Cherokee Nation* are present here.

First, in concluding that ISDA contracts should be treated like ordinary procurement contracts, the Court wrote that it had "found no indication that Congress believed or accepted the Government's current claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an *unrestricted* lump-sum appropriation would prove insufficient to pay *all* contractors." *Cherokee Nation*, 543 U.S. at 640 (emphasis added). Here, however, we confront *restricted* lump-sum appropriations that set a maximum expenditure for contract-support costs; and, perhaps more importantly, the context (as I have previously explained) unambiguously shows that Congress intended, and the tribal organizations were on notice and understood, that the restriction would reduce the contract-support costs to which each was otherwise entitled, thereby imposing on them the risk of an inadequate appropriation.

Second, the Court rejected the government's reliance on the language in § 450j- 1(b) that "the Secretary is not required to reduce funding for programs, projects, or

activities serving a tribe to make funds available to another tribe or tribal organization under [the ISDA]," because no such reduction was necessary. The Court observed that the plaintiff tribes' claims could be paid out of unrestricted funds that had gone for government, not tribal, operations. *See id.* at 641-42. In stark contrast, here the funds necessary to pay one tribal organization's contract-support costs in full would have to come from money that would otherwise go to another contractor because of the appropriations cap on contract-support costs.

Third, the Court rejected the government's argument that the subject-to-availability language of § 450j-1(b) gave the Secretary "authority . . . to adjust funding levels based on appropriations"; it observed that the government could point to no supporting statutory language and that the legislative history merely showed that "Executive Branch officials would have liked to exercise discretionary authority to allocate a lump-sum appropriation too small to pay for all the contracts that the Government had entered into[, but] the history does not show that Congress granted such authority." *Id.* at 643-44 (internal quotation marks omitted). True, the appropriations caps in this case likewise do not confer discretion on the Secretary. But what the Secretary sought *discretion* to do in *Cherokee Nation* is *compelled* here. The Secretary is forbidden to use for contract support any funds in the BIA lump-sum appropriations above the capped amounts.

Fourth, and finally, the Court said that the government could not rely on a 1999 statute setting limits on contract-support costs based on earlier committee reports. The statute said:

> Notwithstanding any other provision of law the amounts appropriated to or earmarked in committee reports for the Indian Health Service for payments to tribes for contract support costs are the total amounts available for fiscal years 1994 through 1998 for such purposes.

Id. at 645 (brackets, ellipses, emphasis, and internal quotation marks omitted). The Court said that it would be reasonable to interpret this language to forbid payment to the plaintiff tribes; but it adopted another interpretation to avoid construing the statute as having a retroactive effect. In the case before us, however, restrictions in the appropriations acts are not being applied retroactively.

To be sure, *Cherokee Nation* does not definitively endorse the government's position in this case. But it certainly did not adopt Plaintiffs' position, either. If it had, the Supreme Court could have short-circuited much of its discussion by simply saying that the government's arguments were beside the point, because even granting all those arguments, there was certainly a sufficient appropriation to pay the contract-support costs of any single tribal organization. As just one example, it would not have had to decide whether to interpret the 1999 statute to apply retroactively, because the plaintiffs in that case would have prevailed anyway.

Accordingly, I reject Plaintiffs' contention that language in *Cherokee Nation*, even if not the holding, compels judgment in their favor.

I now turn to Plaintiffs' two remaining arguments that their ISDA contracts require full payment of their contract-support costs. One argument is that their

ISDA contracts incorporate the provisions of the ISDA; and because the ISDA requires full payment of contract-support costs, each contract does so as well. I reject this argument because, as already explained at length, the ISDA does not require full payment. Full payment is conditioned on the availability of funds. *See* 25 U.S.C. §§ 450j(c)(1), 450j-1(b).

Plaintiffs' other argument is that their construction of the ISDA contracts is compelled by an admission in a government brief in another case. The issue in *Southern Ute Indian Tribe v. Leavitt*, 497 F. Supp. 2d 1245 (D.N.M. 2007), was whether the IHS could be compelled to enter into a new ISDA contract with the Southern Utes even though all funds appropriated for contract-support costs for the year had already been contractually committed. In a brief filed on December 19, 2005, the government made the following statements: (1) "[T]he issue here is whether IHS is potentially liable for contract support costs once it signs on the dotted line. Given the decision in *Cherokee* [*Nation*], IHS at a minimum was reasonable in its belief that by entering a new self-determination contract with plaintiff, it might be implicitly promising to pay contract support costs in excess of Congressional appropriations," J. App., Vol. VII at 1670 (Reply in Support of Defendants' Motion for Summary Judgment at 6, *Southern Ute*, 497 F. Supp. 2d 1245); (2) "According to the [Supreme] Court [in *Cherokee Nation*], the language [of 25 U.S.C. § 450*l*(c) (Model Agreement § 1(b)(4))] gave IHS 'no legal right to disregard its contractual promises,' even in the absence of available appropriations," *id.* at 4; and (3) "Thus, contrary to [Southern Ute's] claim, defendants might be held liable for plaintiff's contract support costs despite

the inclusion of the [subject-to-availability] clause in their contract," *id*. Plaintiffs contend that these statements amount to an admission that their interpretation of their ISDA contracts is plausible, even reasonable, and that therefore we must adopt that interpretation because of the rule that we interpret ambiguities in ISDA contracts in favor of the tribes. *See* 25 U.S.C. § 450*l*(c) (Model Agreement § 1(a)(2)).

I disagree. The contract-interpretation issue in *Southern Ute* was quite distinct from what confronts us. The context of the dispute was as follows: The IHS had informed the Southern Utes that there were no more funds available for contract-support costs. *See Southern Ute*, 497 F. Supp.2d at 1248-49. The IHS was willing to enter into a contract with the tribe for new services but only if the tribe waived its rights to contract-support costs. *See id*. at 1250. The tribe refused to execute a waiver. *See id*. The question then became whether the IHS could therefore refuse to enter into a contract with the tribe. *See id*. at 1252. The IHS was concerned that its executing the standard contract in that context would amount to a binding promise to pay contract-support costs despite the absence of appropriated funds to pay for those costs. *See id*. The quoted statements from the government's brief were to explain why the IHS was concerned. In my view, the context of the contract-interpretation issue before us is sufficiently different that nothing in the government's *Southern Ute* brief amounts to a concession of ambiguity regarding our issue.

D. Are Plaintiffs Entitled to Recovery Because of Executive's Failure to Request Adequate Appropriation?

Plaintiffs' final argument is that the government is liable for full payment because the executive failed to request the needed funding from Congress. They rely on *S. A. Healy Co. v. United States*, 576 F.2d 299 (Ct. Cl. 1978). The holding in *Healy*, however, is quite fact-specific; and the general rule stated in the opinion would not apply here. In that case, Healy and the government executed a fixed-price construction contract in November 1970, before Congress appropriated funds. *See id.* at 300-02. The contract contained the following subject-to-availability clause:

> Under the contract to be entered into under these specifications, the liability of the United States is contingent on the necessary appropriations being made therefor by the Congress and an appropriate reservation of funds thereunder. Further, the Government shall not be liable for damages under this contract on account of delays in payments due to lack of funds.

Id. (internal quotation marks omitted). The contract was also governed by the Reclamation Project Act of 1939, which provided that "'the liability of the United States [on its project contracts] shall be contingent upon appropriations being made therefor.'" *Id.* at 303 (quoting 43 U.S.C. § 388).

On December 22, 1970, Healy (as required by the contract) submitted a proposed schedule of forecasted earnings that set forth, among other things, $4,887,000 for fiscal year 1972. *See id.* at 301. The contracting offi-

cer approved this schedule in February 1971 and Healy promptly began construction. *See id.* Meanwhile, in late January 1971 the President sent his proposed budget to Congress; but he requested only $1,800,000 for Healy's contract for fiscal year 1972. *See id.* at 302. Not until July 1971 did the contracting officer notify Healy how much had been requested. *See id.* Healy protested that the requested amount was "'totally inadequate'" and, on inquiring about the possibility of a supplemental appropriation, was told that prospects were bleak. *Id.* Nevertheless, Healy decided to proceed to the extent possible and continued with construction until September 22, 1971, when funds were exhausted. *See id.* Three months later, Congress approved a supplemental appropriation request that provided enough money to cover Healy's earnings for fiscal year 1972. *See id.* In January 1972 the government notified Healy that more money was available, and construction resumed. *See id.*

Despite the contractual and statutory subject-to-availability provisions, the court awarded damages to Healy. *See id.* It reasoned that the contract did not unambiguously state that the contractor had to bear "the full risk of a funds shortage" when the shortage was the agency's fault; and it found that the government agency was at fault for not requesting a sufficient appropriation to pay the contractor. *Id.* at 304; *see id.* at 305. Consequently, the contractor was entitled to damages caused by the work stoppage between when appropriated funds were exhausted and when a supplemental appropriation bill was enacted. *See id.* at 302, 307-08.

The court described its holding as a narrow one. It said that it was not suggesting that the "executive branch was contractually obligated to request from

[Congress] appropriations adequate to fund continued performance." *Id.* at 307. Rather, it held

> only that (a) a contract will not be construed to throw all the cost and loss necessarily incident to such a decision on the contractor, and none of it on the party whose decision caused the loss, unless clauses of the contract require that result without ambiguity, and (b) . . . a government agency that claims a right to do this is under an implied obligation to assist its contractor, by timely and candid information to take the measures that the latter may deem best to diminish and mitigate its loss.

Id.

The situation presented on this appeal is quite distinguishable from the egregious conduct in *Healy*. Healy was not informed that it might be underpaid until well after the contract was executed and performance had begun. Indeed, the contracting officer approved the contractor's budget even though the President had already requested less than 40% of that sum from Congress, and the officer did not notify the contractor of that request for another five months. Here, in contrast, Plaintiffs do not dispute the government's contention that "the tribes have participated in annual budget consultations with BIA." Aplee. Br. at 48 n.16; *see* 25 U.S.C. § 450j-1(i) (requiring the Secretary to solicit tribes' participation in formulating the BIA's budget requests). And, as I have already explained, the statutory context and the historical course of dealing made it clear to tribal organizations that annual shortfalls were likely and that contract-support costs would be underpaid.

III. CONCLUSION

For the foregoing reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-2262

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE; PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

KENNETH L. SALAZAR, SECRETARY OF THE INTERIOR; EDDIE BROWN, ASSISTANT SECRETARY OF THE INTERIOR; MARVIN PIERCE, CHIEF OF OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR; UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES,

AND

NATIONAL CONGRESS OF AMERICAN INDIANS, AMICUS CURIAE

[Filed: May 9, 2011]

JUDGMENT

Before: LUCERO, MCKAY, and HARTZ, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the District of New Mexico for further proceedings in accordance with the opinion of this court.

Entered for the Court,

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV No. 90-957 LH/WWD ACE

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE AND PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS,

v.

GALE NORTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, ET AL., DEFENDANTS

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense (Docket No. 570).[1] Also under consideration is Defendants' document that contains both a cross-motion for partial summary judgment and a response to Plaintiffs' motion (Docket No. 592).[2]

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[1] This amended motion supercedes the original motion, filed on February 23, 2000 (Docket No. 397).

[2] Defendants' motion has the burdensome title, "Defendants' Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense and Opposition to *Amicus* Pueblo of Zuni's Brief in Support of Plaintiffs' Amended Motion for Partial Summary Judgment"

Plaintiffs' amended motion seeks "judgment in their favor declaring that annual appropriations limitations for FY 1994 forward inserted by Congress as to the amount which the Secretary may use to reimburse contract support costs ("CSC") under contracts with Class members entered pursuant to The Indian Self-Determination and Education Assistance Act of 1975, as amended, 25 U.S.C. Section 450 through 450n ("ISDA"), do not diminish or eliminate (either alone or coupled with ISDA) the obligation of the United States to reimburse CSC at the full level mandated by ISDA otherwise owed to Plaintiffs." (Docket No. 570 at 1).[3] Footnote 1 of the motion specifically states that the appropriations acts at issue are: Public Law 103-138, Public Law 103-272, Public Law 104-134, Public Law 104-208, Public Law 105-83, Public Law 105-277, Public Law 106-113, and Public Law 106-291.

This motion clarifies it applies to the claims, not yet settled for the years FY 1994 and thereafter, including the original cause of action upheld in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), and the Class's second cause of action added by amendment (*see* Docket No. 352) and by complaint in intervention (*see* Docket No. 353).

(Docket No. 594), referred to herein simply as "Defendants' Cross-Motion" or "Defendants' Response." Defendants also filed a separate response to Plaintiffs' statement of facts (Docket No. 596).

[3] This motion relies upon materials that accompanied the original motion (Docket No. 397), Attachments A-H, as well as those attached to this amended motion, Attachments I-S. The motion also incorporates by reference Plaintiffs' Attachments to their Motion for Partial Summary Judgment (Docket No. 58).

The second cause of action added by amendment is entitled a "Claim for Underpayment of Indirect Costs for Alleged Insufficiency of Appropriations" (Docket No. 352). This claim specifically states that it applies to the indirect cost shortfalls that have occurred in each fiscal year since FY 1994, when Congress began inserting the phrase "not to exceed" before the specific dollar amount for contract support under ISDA contracts or compacts. Paragraph 29 of this claim states that shortfalls in indirect cost payments to the Class caused by alleged insufficiency of appropriations are different from but also encompass the underpayment of indirect costs to the Class caused by under-calculation of indirect cost rates as pled and litigated to this point in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). This claim asserts that the United States owes to Plaintiff and the members of the Class the difference between the contract amount for contract support set by each applicable contract or annual funding agreement for each fiscal year since the beginning of 1994, and the level of reimbursements received (Docket No. 352, ¶ 36).

In its complaint in intervention (Docket No. 353), the Oglala Sioux Tribe states that it seeks to intervene for the purpose of expanding its original claim to encompass all class-wide shortfalls. (*Id.*, ¶ 1). Specifically, in this complaint, Plaintiff-in-Intervention states that it seeks damages for all shortfalls during and since FY 1994, caused by Defendants' assertion that they did not have sufficient funds from annual appropriations to cover 100% of their "need." *Id.*

Defendants filed a cross-motion for partial summary judgment (Docket No. 592), arguing that this Court should hold that Defendants are entitled to judgment as

a matter of law on all of Plaintiffs' claims for FY 1994 to the present, based on the conclusion that the ISDA limits the liability of the government to pay Plaintiffs' contract support costs based upon available United States Department of Interior appropriations.

The Court, having read the cross motions for partial summary judgment, as well as all supporting and opposing briefs, including supplementary briefs, the full court record, relevant statutes and case law, for the reasons that follow, concludes that Plaintiffs' motion shall be denied and the Government's motion shall be granted insofar as it opposes Plaintiffs' motion for partial summary judgment.[4]

Procedural Background

This class action arises under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450, *et seq.* This statute authorizes the Bureau of Indian Affairs ("BIA"), a component of the United States Department of the Interior ("DOI"), to contract with and fund Indian tribes and tribal organizations that choose to take over the operations of programs and services formerly operated by the BIA.

Plaintiffs are tribal contractors who have sued DOI and several of its officials (collectively referred to herein as "Defendants"), alleging violations of the ISDA. In essence, Plaintiffs claim that, as tribal contractors, they

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[4] The real focus of Defendants' cross-motion is its opposition to Plaintiffs' motion for partial summary judgment. Given the result contained in this Memorandum Opinion and Order, it is unnecessary for the Court to reach the alternatives alluded to in the title of Defendants' cross-motion, *i.e.*, the striking of a defense or of an *amicus* brief.

are entitled to receive full payment of all contract support costs they seek under their ISDA contracts.

The motions now under consideration were briefed in 2001 and stayed in 2002 (Docket 671), pending completion of the appeal of *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002). The appeal was ultimately decided by the United States Supreme Court in March 2005, in *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005)("*Cherokee Nation*"). The stay was lifted on May 6, 2005, and supplemental briefing was concluded on October 21, 2005.

Statutory Language

As in any case of statutory interpretation, the Court will begin with the language of the relevant statutes. The ISDA's stated purpose is to allow Native American tribes to operate their own federal programs directly. Under the ISDA, a tribe and the Secretary of Interior enter into a "self-determination contract," which incorporates the provisions of the model contract contained in the ISDA text. *See* 25 U.S.C. § 450*l*(a), (c) (1994).

The Act specifies that the Government must pay a tribe's costs, including administrative expenses. *See* 25 U.S.C. §§ 450j-l(a)(1) and (2). Administrative expenses include: (1) the amount that the agency would have spent "for the operation of the progra[m]" had the agency itself managed the program, *id.* § 450j-1(a)(1); and, (2) "contract support costs," the costs at issue in this case. *id.* § 450j-1(a)(2).

The Act defines "contract support costs" as other "reasonable costs" that a federal agency would not have incurred, but which nonetheless "a tribal organization"

acting "as a contractor" would incur "to ensure compliance with the terms of the contract and prudent management." *id.* § 450j- 1(a)(2). "Contract support costs" can include indirect administrative costs, such as special auditing or other financial management costs, *id.* § 450j-1(a)(3)(A)(ii); they can include direct costs, such as workers' compensation insurance, *id.* § 450j-1(a)(3)(A)(i); and they can include certain startup costs, *id.* § 450j-1(a)(5). Most contract support costs are indirect costs "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." *Cherokee Nation*, 543 U.S. at 635 (citation omitted); *see* 25 U.S.C. §§ 450b(f)-(g).

Section 25 U.S.C. § 450j-1 is entitled "Contract funding and indirect costs." Subsection (a) describes the amount of funds to be provided. For example, DOI is obligated to provide direct costs "not less than the appropriate Secretary would have otherwise provided for the operation of the programs . . . for the period covered by the contract." 25 U.S.C. § 450j-1(a)(1). In addition, DOI must supply "contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management. . . . " *Id.* § 450j-1(a)(2). The next subsection, 450j-1(b), describes reductions and increases in the amount of funds provided. This subsection concludes with the unequivocal statement that: "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations. . . . " *id.* § 450j-1(b). *See also* 25 U.S.C. § 450-

j(c)(1)("The amounts of [self-determination] contracts shall be subject to the availability of appropriations.")

Section 450*l* of the ISDA contains a model agreement that provides that the "[f]unding amount" of the contracts are "subject to the availability of appropriations." See Section 1(b)(4) of the Model Contract, 25 U.S.C. § 450*l*(c). Plaintiffs' actual self- determination contracts contain similar language. (*See* Ex. B to Defs.' Suppl. Mem.). Such provisions make clear that the contractual liability of the Government is subject to the availability of appropriations, and that disbursement of those available funds will be made according to the BIA's "policies and procedures," including procedures for the pro rata distribution of available funds. *Id.*; *see also* Smith Decl., ¶ 4 (*See* Ex. E to Defs.' Suppl. Mem.)(explaining that the BIA sends out notices each fiscal year that set forth the procedures for the pro rata distribution of contract support costs).

The Court has examined the relevant BIA Appropriations Acts. (*See* Ex. A to Defs.' Suppl. Mem.). The first "not to exceed" language, or "cap", was inserted in the appropriation Act for FY 1994, Public Law 103-138: " . . . Provided further, that not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended, for FY 1994 and previous years. . . . "[5] The FY

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[5] Congress was well aware that there might be shortfalls in contract support costs for ISDA contracts, and it provided for consideration of the shortfalls within the appropriations process. In particular, section 450j-1(c) requires the Secretary to provide an annual report to Congress, including "(2) an accounting of any deficiency in funds needed to

1995 appropriation act, Public Law 103-332, included similar cap language but substituted the phrase "contract support costs" for "indirect costs," as has every appropriation act since then. The later language covers both indirect and direct contract support payments. (*See* Pls.' Mem. in Supp. of Amend. Mot. for Partial Summ. J., Docket No. 571, n.4).

The language in each of these acts generally follows the same pattern. For example, the 1998 appropriations act, 111 Stat. 1543 (Nov. 14, 1997), provides that nearly $1.53 billion will be provided for the operation of a wide variety of Indian programs, and that the funds will remain available until September 30, 1999. Of this appropriated amount, the Act provides that "not to exceed $105,829,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended. . . . "

Material Facts Not in Dispute

These facts appear to be undisputed:

1. For every fiscal year since 1994, Congress has placed a cap in the annual appropriations acts for BIA

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provide required contract support costs to all contractors for the fiscal year in which the report is being submitted; . . . . " Pursuant to its reporting requirements, each fiscal year, BIA prepares a table setting forth the shortfalls in CSC. *See* Declaration of Harry Rainbolt ("Rainbolt Decl."), ¶¶ 3-6 (Ex. C to Defs.' Cross-Mot. for Partial Summ. J. This table is included in the annual President's Budget Request to Congress each fiscal year to aid Congress in the appropriation process. *Id.* ¶¶ 5-6.

limiting the amount of funding the Secretary could expend from the appropriations.

2. In every fiscal year since 1994, BIA has distributed to tribal contractors the full amount of CSC funding appropriated for that purpose in Public Laws 103-138, 103-332, 104-134, 104-208, 105-83, 106-113, 106-291.

3. The amounts needed by tribal contractors for CSC each year have exceeded the amount of appropriated funds that Congress set aside each year since 1994 for that purpose. For example, in 2001, CSC needs exceeded Congress's $125,209,000 CSC cap by $16 million. (*See* Rainbolt Decl., ¶ 6, Ex. C to Defs.' Cross-Mot. for Partial Summ. J).

Legal Discussion

Both the Federal and D.C. Circuits have addressed the issue in this case, ruling that caps on appropriations, in conjunction with the "availability of appropriations" language in the ISDA, limit the liability of the government to pay additional amounts of contract support costs, even if this means that the amount provided is less than the amount negotiated in the self-determination contracts. Congress has the authority to determine the amount of appropriated funds the agency may obligate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are "subject to the availability of appropriations," and by placing caps in appropriations statutes. These cases have concluded that the ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs ("CSC") in amounts in excess of "capped" CSC appropriations.

Babbitt v. Oglala Sioux Tribal Public Safety Dept., 194 F.3d 1374 (Fed. Cir. 1999), is the Federal Circuit case that examined this issue. That case involved the Oglala Sioux Tribal Public Safety Department, a tribal organization operating an ISDA contract for public safety on the Pine Ridge Reservation in South Dakota for the Oglala Sioux Tribe. In the lawsuit, for fiscal year 1995, Oglala sought reimbursement of the difference between the originally negotiated amount and what it actually received from the Secretary of Interior, a difference of $108,506.00. For fiscal year 1995, Congress appropriated $1.5 billion for the operation of Native American programs, "of which not to exceed $95,823,000 shall be for payments . . . for contract support costs" for contracts authorized by the ISDA. *See* Interior Appropriations Act of 1995, Pub.L.No. 103-332, 108 Stat. 2499, 2511 (1994).

The Federal Circuit concluded that the language of § 450j-1(b) is clear and unambiguous and that any funds provided under an ISDA contract are "subject to the availability of appropriations." That Court noted that the clause preceding this limitation, "[n]otwithstanding any other provision in this subchapter," further clarifies that other language in the ISDA[6] cannot "trump" this express restriction on ISDA funding. *Id.* at 1378. The

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[6] *See* 450-j-1(f): "Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a)."

Court went on to rely on §§ 450j(c)[7] and 450*l*(c)[8], as indicators of congressional intent to make ISDA funding subject to the availability of funding.

The *Oglala Sioux* Court also concluded that the general intent underlying the ISDA could not trump the express language of the statute. It noted that in the face of congressional under-funding, an agency can only spend as much money as has been appropriated for a particular program. Relying on various canons of statutory construction, the *Oglala Sioux* Court also rejected an argument that Congress intended ISDA indirect costs to be fully funded, noting that such an interpretation of congressional intent would render the "subject-to" appropriations language of § 450j-1(b) meaningless. The Court stated that it would exceed its judicial function if it were to repeal the unambiguous language of § 450j-1(b) in such a fashion, and that it must assume that Congress "says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, . . . 'judicial inquiry is complete.'" *Id.* at 1378, quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

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[7] This section sets the term of self-determination contracts and states "[t]he amounts of such contracts shall be subject to the availability of appropriations."

[8] As mentioned above, this section sets out language of the model agreement referred to in each self-determination contract under the ISDA, which specifies that "[s]ubject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement . . . "

The *Oglala Sioux* Court distinguished *New York Airways, Inc. v. United States*, 369 F.2d 743 (1966), noting that that case involved a situation in which the Government, as a contracting party, had simply failed to appropriate and pay its unqualified contractual obligation. The *Oglala Sioux* Court noted that the situation before it "differs fundamentally in that the ability of Interior to bind the Government contractually was expressly conditioned on the availability of appropriations." *Oglala Sioux* 194 F.3d at 1379. Accordingly, that Court found the *New York Airways* analysis and conclusion unpersuasive.

The *Oglala Sioux* Court noted that the D.C. Circuit "found the language of 450-j-1(b) as clear as we do," and reached the same conclusion in the case of *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996)("*Ramah I*"). *Oglala Sioux*, 194 F.3d at 1379. *Ramah I* discussed § 450-j-1(b) of the ISDA in its analysis of how much discretion the Secretary had to allocate indirect funds with respect to the 1995 congressional cap on the appropriation amount available for ISDA contract support costs. The *Ramah I* Court noted that the Secretary is "not required to distribute money if Congress does not allocate that money to him under the Act. The first part of the provision [§ 450-j-1(b)] says just that. . . . " *Ramah I*, 87 F.3d at 1345. The Court then concluded that despite a Tribe's claim that it is entitled to the funds under the ISDA, if the money is not available, it need not be provided. *Id.*[9]

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[9] The ultimate outcome in *Ramah I* turned on the validity of the Secretary's 1995 allocation plan for the limited amount of indirect cost money available.

***Cherokee Nation* is Distinguishable from this Case**

This Court agreed to stay the parties' cross-motions for partial summary judgment, based on its stated belief that it was substantially likely that the issues before the Court in these motions would be addressed in a case that was then pending in the Tenth Circuit Court of Appeals[10] and that was ultimately appealed to the Supreme Court in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In fact, as noted by Plaintiffs in their supplemental memorandum (Docket No. 962), filed following entry of the Supreme Court opinion, the *Cherokee Nation* case did not reach pivotal issues that remain to be decided by this Court.

Specifically, while arguing that *Cherokee Nation* "affirmed the sanctity of ISDA contracts," Plaintiffs acknowledge that the Supreme Court did not reach the issue as to whether the United States remains liable for shortfalls in contract payments, when Congress has specified an insufficient "not to exceed" lump sum appropriation. (Pls. 'Mem. in Supp. of Amend. Mot. for Partial Summ. J. at 2). They also note that the Supreme Court failed to reach the issue as to whether the phrase "subject to availability of appropriations" speaks to the Secretary's expenditure authority or to the liability of the United States. Finally, they note that the Supreme Court did not reach the issue of whether or not the United States remains liable for the full contract amount if the agency fails to request an adequate appropriation and the contract does not clearly impose the risk of an inadequate request on the contractor.

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[10] *See Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002).

The Supreme Court granted certiorari and consolidated two Court of Appeals cases[11] that contained identical claims yet reached opposite results. In these cases, the United States and two Indian Tribes had entered into agreements in which the Government promised to pay certain "contract support costs" that the Tribes incurred during fiscal years 1994 through 1997. The Tribes made claims for $3.5 million (Shoshone-Paiute) and $3.4 million (Cherokee Nation) in the first case, and $8.5 million (Cherokee Nation) in the second case. In *Cherokee Nation*, the Supreme Court addressed the Government's liability for contract under-payments in years when Congress did not limit the amount of funds available to the agency to pay the contracts. The parties colloquially call such claims the "lump sum" claims, because the agency simply had a large "lump sum" appropriation from which to pay the contracts.

The Supreme Court phrased the question before it as being "whether the Government's promises are legally binding," and concluded that they are, under the circumstances then before the Court. *Cherokee Nation*, 543 U.S. at 634. In *Cherokee Nation*, Plaintiffs' claims were for far less than the amounts appropriated by Congress (between $1.277 billion and $1.419 billion) for the Indian Health Service to "carry out," the Indian Self-Determination Act. *See* 107 Stat. 1408 (1993); 108 Stat. 2527-2528 (1994); 110 Stat. 1321-189 (1996); *id.* at 3009-212 to 3009- 213 (1996). According to the Supreme Court opinion, "*[T]hese appropriations Acts contained no relevant*

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[11] *See Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002) and *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003).

statutory restriction." Cherokee Nation, 543 U.S. at 637 (emphasis added).

All four of the statutes that were before the Supreme Court in the *Cherokee Nation* case contain language similar to each other. For example, the earliest statute, 107 Stat. 1408 (Nov. 11, 1993) appropriated approximately $1.646 billion for services furnished by the Indian Health Service. Of these funds, approximately $3.61 million were specifically allocated or restricted to the following uses: $12 million for the Indian Catastrophic Health Emergency Fund; $337.8 million for contract medical care; and, $11.52 million for a loan repayment program. The amount of *unrestricted* funds in this statute is approximately $1.28 billion. The other three statutes provide restrictions for the same categories, but with different amounts for each fiscal year. These other statutes provide for unrestricted funds that range from $1.43 billion to $1.37 billion.

The Supreme Court concluded: "Since Congress appropriated *adequate unrestricted funds* here, [the subject to the availability of appropriations language], if interpreted as ordinarily understood, would not help the Government." *Id.* at 643 (emphasis added). In its opinion, *Cherokee Nation* made repeated reference to the lack of legally binding restrictions in the IHS lump-sum appropriations, implicitly making the distinction between the type of lump-sum appropriations without legal restriction in that case, and the restrictive appropriation statutes now before this Court, containing statutory earmarks and caps. *Id.* at 639-643. The Supreme Court noted that a "fundamental principle of appropriations law [is] that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be

done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions. . . . " *Id.* at 637 (internal quotations omitted).

As acknowledged by Plaintiffs, the Supreme Court did not directly address the liability of the Government when there is a capped appropriation that bulks together funds owed to hundreds of contracts, as in the immediate case. This is a very different statutory scheme from that considered by the *Cherokee Nation* court. The obvious implication from the *Cherokee Nation* case is that, where there are legal restrictions in the agency's appropriations, the "subject to the availability of appropriations" language serves to limit governmental liability under the contracts to the amount of those restricted funds.

Conversely, the "subject to the availability of appropriations" language, given its ordinary meaning, "normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become *binding* unless and until Congress appropriates funds for that year. It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations." *Cherokee Nation*, 543 U.S. at 643 (citations omitted).

Conclusion

This case, like the *Oglala Sioux* and *Ramah I* cases, involves the issue of congressional under-appropriations of funds. This Court is persuaded by the logic of the *Oglala Sioux* and *Ramah I* cases, and reaches the same conclusion that the United States is not liable for short-

falls in contract payments when Congress has specified an insufficient "not to exceed" lump sum appropriation. This language does not speak to the Secretary's expenditure authority, but ultimately to the lack of liability of the United States to pay contract support costs in excess of the appropriated, capped dollar amounts. The ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs in amounts in excess of capped contract support cost appropriations.

Congress has the authority to determine the amount of appropriated funds the agency may obligate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are "subject to the availability of appropriations," and by placing caps in the BIA's appropriations statutes. These appropriations were made with Congressional knowledge of the potential for CSC shortfalls for ISDA contracts and it provided for consideration of the shortfalls within the appropriations process.

WHEREFORE, for the reasons stated herein, Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense (Docket No. 570) is **denied;** and Defendants' Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Amended Motion for Partial Summary Judgment or in the Alternative to Strike Defense and Opposition to *Amicus* Pueblo of Zuni's Brief in Support of Plaintiffs' Amended Motion for Partial Summary Judgment (Docket No. 594) is **granted** to the extent that it opposes Plaintiffs' amended motion for partial summary judgment.

FURTHERMORE, the Court notes that this Memorandum Opinion and Order resolves all remaining pending motions before the Court. The parties are hereby instructed to inform the Court, in writing, within fifteen (15) days, whether or not any issues remain in this matter that require the further attention of the Court, prior to entry of a Final Judgment.

IT IS SO ORDERED.

/s/ LEROY HANSEN
LEROY HANSEN
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-2262

RAMAH NAVAJO CHAPTER; OGLALA SIOUX TRIBE; PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

KENNETH L. SALAZAR, SECRETARY OF THE INTERIOR; LARRY ECHO HAWK, ASSISTANT SECRETARY OF THE INTERIOR; MARY L. KENDALL, ACTING CHIEF OF OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR;* UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES,

AND

THE NATIONAL CONGRESS OF AMERICAN INDIANS, AMICUS CURIAE

[Filed: Aug. 1, 2011]

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* Pursuant to Fed. R. App. P. 43(c)(2) Kenneth Salazar is substituted for former Secretary of the Interior, Dirk Kempthorne; Larry Echo Hawk is substituted for former Assistant Secretary of the Interior, Eddie Brown; and Mary L. Kendall is substituted for former Chief of Office of Inspector General, Marvin Pierce.

ORDER

Before: LUCERO, MCKAY, and HARTZ, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

1. 25 U.S.C. 450b provides in pertinent part:

Definitions

For purposes of this subchapter, the term—

* * * * *

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 *et seq.*], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal *organization and the appropriate Federal agency*;

* * * * *

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this

subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided,* That except as provided[1] the last proviso in section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * * *

(*l*) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided,* That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

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[1] So in original. Probably should be "provided in".

2. 25 U.S.C. 450f provides in pertinent part:

Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C.A. § 452 *et seq.*];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C.A. § 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C.A. § 2001 *et seq.*];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and

the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for

the contract, as determined under section 450j-1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection,[1] if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspec-

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[1] So in original. Probably should be "paragraph".

tion and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under section 450j-1(a) of this title,

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 450j-1(a) of this title. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title.

* * * * *

3. 25 U.S.C. 450j(c) provides:

Contract or grant provisions and administration

Term of self-determination contracts; annual renegotiation

(1) A self-determination contract shall be—

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

* * * * *

4. 25 U.S.C. 450j-1 provides in pertinent part:

Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities

which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall;—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) Reductions and increases in amount of funds provided

The amount of funds required by subsection (a) of this section—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

(c) Annual reports

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

* * * * *

(g) Addition to contract of full amount contractor entitled; adjustment

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * * * *

5. 25 U.S.C. 450*l* provides in pertinent part:

Contract or grant specifications

(a) Terms

Each self-determination contract entered into under this subchapter shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) *contain such other provisions as are agreed to by* the parties.

* * * * *

(c) Model agreement

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.

"(a) AUTHORITY AND PURPOSE.—

"(1) AUTHORITY.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) are incorporated in this agreement.

"(2) PURPOSE.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) TERMS, PROVISIONS, AND CONDITIONS.—

"(1) TERM.—Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance

Act (25 U.S.C. 450j(c)(1)), the term of this contract shall be _____ years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

"(2) EFFECTIVE DATE.—This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

"(3) PROGRAM STANDARD.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

"(4) FUNDING AMOUNT.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

"(5) LIMITATION OF COSTS.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that

the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

* * * * *

"(c) OBLIGATION OF THE CONTRACTOR.—

"(1) CONTRACT PERFORMANCE.—Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) AMOUNT OF FUNDS.—The total amount of funds to be paid under this Contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) CONTRACTED PROGRAMS.—Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

* * * * *

"(f) ATTACHMENTS.—

* * * * *

"(2) ANNUAL FUNDING AGREEMENT.—

"(A) In general.—The annual funding agreement under this Contract shall only contain—

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) INCORPORATION BY REFERENCE.—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

6. 25 U.S.C. 450m-1 provides in pertinent part:

Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims,

over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

* * * * *

(d) Application of Contract Disputes Act

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

* * * * *

7. 31 U.S.C. 1304(a) provides:

Judgments, awards, and compromise settlements

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

(1) payment is not otherwise provided for;

(2) payment is certified by the Secretary of the Treasury; and

(3) the judgment, award, or settlement is payable—

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

8. 31 U.S.C. 1341(a)(1)(A)-(B) provides:

Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

9. 41 U.S.C. 7108(a)-(c) [formerly codified at 41 U.S.C. 612] provides:

Payment of claims

(a) Judgments

Any judgment against the Federal Government on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board shall be paid promptly in accordance with the procedures contained in subsection (a).

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304

of title 31 by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement.

OPPOSITION BRIEF

No. 11-551

IN THE

Supreme Court of the United States

KENNETH L. SALAZAR, *et al.*, *Petitioners*,

v.

RAMAH NAVAJO CHAPTER, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

In *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005), this Court held that a contract authorized under the Indian Self-Determination Act (ISDA) is enforceable like any other government contract. That decision further held that breach of the contractual promise to pay full contract support costs to a contractor is enforceable through a suit for money damages under the Contract Disputes Act, so long as Congress has appropriated sufficient funds to pay that contractor, even if it has not appropriated sufficient funds to pay all contractors nationwide.

The question presented is:

Whether, under *Cherokee*, a contractor which fully performed a contract was entitled to be paid the full contract price, where earmarked "not to exceed" appropriations were more than sufficient to pay that contractor but were insufficient to pay all the contracts the agency had made.

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Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292 (1988) 3
Pub. L. No. 103-138, 107 Stat. 1379 (1993) 6
Pub. L. No. 103-332, 108 Stat. 2499 (1994) 6
Pub. L. No. 103-413, 108 Stat. 4250 (1994)
§ 102(14) 3
§ 102(17) 3
§ 103 4

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62 Fed. Reg. 1468 (1997) 7

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OMB Circular A-87, 2 C.F.R. pt. 225 & Appx. B 4

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Brief *Amici Curiae* of the Chamber of Commerce of the U.S. & the National Defense Industrial Ass'n in Support Of Petitioner, *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *cert. pending*, 80 U.S.L.W. 3059 (U.S. July 19, 2011) (No. 11-83) 24

Brief for Petitioner, *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *cert. pending*, 80 U.S.L.W. 3059 (U.S. July 19, 2011) (No. 11-83) 10, 25

3 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 14-31 (3d ed. 2008) 21

No. 11-551

In the Supreme Court of the United States

KENNETH L. SALAZAR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-87a) is reported at 644 F.3d 1054. The opinion of the district court (Pet. 90a-107a) is not reported.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at

25 U.S.C. §§ 450-458bbb-2) and other laws are set forth at Pet. 110a-131a.

STATEMENT

1. Respondent incorporates by reference the Tenth Circuit's statement of the case set forth at. Pet. 4a-14a. To summarize, Congress in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450bbb-2 ("ISDA"), required the Secretaries of Interior and Health and Human Services to award contracts upon request to qualified Indian Tribes and tribal organizations to perform the Secretaries' service programs. The purpose of this initiative was to enhance tribal self-governance, improve Indian education, and improve the delivery of governmental services to Indian people through a contracting mechanism that the Tribes, instead of the agencies, would control.

Originally, the Act simply directed that the amount of funds to be provided in ISDA contracts "shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract." Pub. L. No. 93-638, § 106(h), 88 Stat. 2203, 2211-12 (1975). But it quickly became clear that this 'secretarial amount' was insufficient to maintain program levels under contract, because program funds were being diverted to cover contractor overhead and administrative costs (for the most part, "indirect costs"). The agencies began to add supplemental funding for these indirect costs (also known as "contract support costs"), but the agencies' haphazard policies and actions proved unworkable.

Following years of controversy and congressional investigations into this problem and related difficulties in enforcing contract rights under the Act, Congress in 1988 converted what had until then been discretionary supplemental funding for contract support costs into a statutory right to have such costs fully funded, on a par with the existing right to have the full secretarial amount added to the contract. Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292 (1988) (adding 25 U.S.C. § 450j-1(a)(2)). Congress also made clear that ISDA agreements were contracts, fully enforceable as such for "money damages" against the government, in actions brought under the Contract Disputes Act. *Id.*, § 205, 102 Stat. at 2294-95 (adding 25 U.S.C. § 450m-1).

In 1994 Congress reinforced this mandate in three ways. First, Congress elaborated upon the kinds of indirect costs and other contract support costs that were to be added to each contract. Pub. L. No. 103-413, § 102(14), 108 Stat. 4250, 4257-58 (1994) (adding 25 U.S.C. § 450j–1(a)(3), (5)).

Second, Congress added the directive that, upon the approval of a contract, "the Secretary *shall add* to the contract the full amount of funds to which the contractor is entitled under [§ 450j–1(a)]", meaning the secretarial amount under § 450j–1(a)(1), plus the contract support cost amount under § 450j-1(a)(2). Pub. L. No. 103-413, § 102(17), 108 Stat. at 1259 (adding 25 U.S.C. § 450j–1(g)) (emphasis added).

Third, Congress instructed that "the total amount specified in the annual funding agreement ... shall not be less than the applicable amount

determined pursuant to [450j-1(a)]" (again, meaning the secretarial amount plus the contract support cost amount). *Id.* at § 103, 108 Stat. at 4260-68 (adding 25 U.S.C. § 450*l*(c), Model Contract, sec. 1(b)(4)(A)).

As is typical in contracting arrangements where the contract is awarded before the fiscal year begins, the 1988 and 1994 Amendments provide that payments are "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b) (1988); 25 U.S.C. § 450*l*(c) (Model Contract sec. 1(b)(4)) (1994).

2. Most contract support costs are comprised of "indirect costs." *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 635 (2005) ("*Cherokee*"). The "reasonable" amount of indirect costs is typically determined by the negotiation of an indirect cost rate with a government agency. The process for negotiating indirect cost rates is set forth in OMB Circular A-87, 2 C.F.R. pt. 225 and Appx. B. Negotiations are conducted by the "cognizant agency," in this case a branch of the Interior Department. Once the rate is established, the Secretary multiplies the rate against the program base (the secretarial amount) to determine the required amount of indirect costs that the Bureau of Indian Affairs ("BIA") must add to the contract pursuant to 25 U.S.C. §§ 450j-1(a)(2) and 450j-1(g). *Cherokee*, 543 U.S. at 635; *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1463 n.8 (10th Cir. 1997) (*Ramah I*). Similar federal standards control the determination of direct contract support costs to be added under 25 U.S.C. § 450j-1(a)(3)(A)(i).

The United States' contract obligations for contract support costs are always mathematically determinable. Importantly, contract support cost

requirements are not mere "requests" for whatever a tribal contractor wants, Pet. 4, 8, 10, 12, 16, 18, 20 n. 7, 27, 29. Nor are they "demands." *Id.* at 9, 10, 13, 18, 30. They are determinable amounts that are set by the government under rigorous government standards and audit requirements. Midyear, the agency is required to submit a shortfall report to Congress based on these full contract support cost requirements. 25 U.S.C. § 450j-1(c).

3. The Ramah Navajo Chapter ("Ramah"), the Oglala Sioux Tribe ("Oglala"), and the Pueblo of Zuni ("Zuni") are parties to indefinite term "mature" ISDA contracts with the United States, awarded by the Secretary of the Interior.[1] Cir. J.A. 878-1016. Congress dictated the contract language verbatim in the ISDA. 25 U.S.C. § 450*l*(c). Each contractor also entered into "annual funding agreements" pursuant to sections 1(b)(4) and 1(f) of the Model Contract. Pursuant to these contracts, Ramah, Oglala, and Zuni administer Federal governmental services which the government would otherwise carry out, including law enforcement, courts, education assistance, land management, probate assistance, natural resources services, employment assistance, child welfare assistance, emergency youth shelters and juvenile detention services. J.A. Cir. 891, 932, 943, 985-987.

This case commenced in 1990 and was certified as a class action in 1993. In the first phase of this litigation, the Tenth Circuit concluded that

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[1] The Pueblo of Zuni joined the case as co-plaintiff after the motion for summary judgment decided below was filed. For that reason, its data are not included in the record.

the Secretary's process for setting indirect cost requirements was flawed. *Ramah I.* In the second phase the parties settled the government's liability on all claims based on this rate-making defect for fiscal years 1989-1993. *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999) (approving settlement). In the third phase (after Oglala and Zuni had intervened) the parties settled the government's liability for failing to pay full indirect contract support costs in fiscal years 1992-1993, and for failing to pay direct contract support costs in fiscal years 1992-1994. *Ramah Navajo Chapter* v. *Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002) (approving settlement). In the fourth phase the district court approved a partial settlement granting equitable relief to the class over the ratemaking process and related issues. *Ramah Navajo Chapter* v. *Kempthorne*, No. CIV 90-0957 (D.N.M. Aug. 27, 2008).

The current phase concerns the government's liability in fiscal years 1994 through 2001 for unpaid indirect costs, and in fiscal years 1995 through 2001 for unpaid direct contract support costs. These are the years when the congressional appropriation to the Secretary for payment of indirect contract support costs (FY 1994), or for all contract support costs (FY 1995-2001), was capped by a "not to exceed" clause that limited the appropriation to a stated sum. Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993); Pub. L. No. 103-332, 108 Stat. 2499, 2528 (1994).

Months after the commencement of each fiscal year, the BIA published a notice in the Federal Register addressed to "BIA personnel." Cir. J.A. 265,

273-306. Typical is 62 Fed. Reg. 1468-1470 (1997). The annual notice contained instructions to those personnel for "carrying out their responsibilities when distributing [the capped contract support costs appropriation]," noting that the instructions "are not regulations establishing program requirements."

The notices did not announce reductions in contract price. *Id.* Instead, they stated that 75% of the previous year's contract support cost requirement would be paid immediately, and that final payment would await further calculations. See, *e.g.*, *id.* at 1469. The notices said that *if* the appropriation proved to be insufficient to pay all contractors in full, the BIA would make a pro rata apportionment of the remaining appropriations. In the last month of the fiscal year (often not until the very last days)—when for all practical purposes full contractor performance was complete—the BIA made a second payment of contract support costs. Cir. J.A. 270, 280-81, 288, 301-02, 305-06, 809, 811, 1186, 1188. None of the notices advised the contractor of its right to curtail services if payments were not made but did suggest using program funds to make up insufficiencies. In each of the years at issue, this second payment was insufficient to pay the balance due for contract support costs. Pet. 8a.

Delays and insufficiencies in recovery of CSC greatly impacted delivery of contractors' government services. Cir. J.A. 268-270, 875-877.

Under the Act the Secretary was supposed to submit to Congress a mid-year report of any deficiency in contract support cost payments due the contractors, contractor by contractor. 25 U.S.C.

§ 450j-1(c). The uncontroverted evidence is that these annual deficiency reports either were never submitted, or were submitted long after the years in question were over. Cir. J.A. 240-256. The uncontradicted evidence also showed that in the years at issue the Executive Branch never asked Congress for the full amount required to pay all of the contractors' contracts. Cir. J.A. 231, 239, 1380, 1384, 1388, 1392, 1396, 1400.

4. The district court entered summary judgment for the government, ruling that "the United States is not liable for shortfalls in contract payments when Congress has specified an insufficient 'not to exceed' lump sum appropriation." Pet. 105a-106a.

The Tenth Circuit reversed. In a careful and scholarly opinion the court found the outcome controlled by this Court's recent unanimous decision in *Cherokee*, and three cases discussed therein, *Lincoln* v. *Vigil*, 508 U.S. 182 (1993); *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892); and *Dougherty* v. *United States*, 18 Ct. Cl. 496 (1883).

The court of appeals began by focusing on (1) the government's argument "that the phrase 'subject to the availability of appropriations' ... unambiguously limits the plaintiffs' entitlement to [contract support cost] funding to a pro rata share" of each annual appropriation, and (2) Respondents' contention that the availability clause instead "voids the government's obligation on a given contract only if Congress fails to appropriate enough funds to pay that particular contract." Pet. 16a. The court of appeals found ready answers because "we do not

write on a blank slate." Pet. 16a. While the court made note of the mandatory rule of statutory and contract construction favoring tribal contractors—a rule which Congress placed in the Act and the contract (Pet. 15a, citing 25 U.S.C. § 450*l*(c), Model Contract, sec. 1(a)(2))—together with the related common law canon of construction, the court never applied the rule or the canon because it found answers in clear and controlling principles of federal contract and appropriations law.

The court of appeals drew upon "three principles set down by the Supreme Court" to resolve the issue presented. Pet. 17a. First, the government was wrong to insist that the Secretary had a duty to prorate the contract support cost appropriation across all contractors—and that a given contractor therefore only had an entitlement to that prorated amount—because the contract support appropriation at issue was a lump-sum appropriation over which the Secretary had complete discretion. As this Court said in *Lincoln*, 508 U.S. at 192, "'where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions.'" Pet. 17a (quoting same) (internal quotations omitted). The court of appeals noted that the Secretary's discretion with respect to such a lump sum amount is only limited by "the concept of legal availability," Pet. 18a, under which secretarial expenditures must simply meet the traditional purpose-time-amount rule. Pet. 18a-19a.

The government has now abandoned the proposition championed below that Ramah, Oglala

and Zuni were entitled only to a pro rata share of the contract support appropriation—understandably so, for in the parallel *Arctic Slope* litigation the government must defend the Secretary's allocation of an identical lump sum appropriation in a fashion that was anything but pro rata, and which actually overpaid some contractors while underpaying most. *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *cert. pending*, 80 U.S.L.W. 3059 (U.S. July 19, 2011) (No. 11-83) (Petition at 5).

Second, the court of appeals again drew upon *Cherokee* for the principle that "'mutual self awareness among tribal contractors [does not mean that] tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors.'" Pet. 17a, 22a (citing *Cherokee*, 543 U.S. at 640). That is, the several hundred other contractors dealing with the Secretary along with Ramah, Oglala and Zuni "are not a single conglomerated entity simply because each lays claim to a portion of the same appropriation any more than all federal highway contractors represent a single, undifferentiated mass." Pet. 21a-22a.

The court of appeals drew upon the "venerable" opinion in *Ferris*—cited three times by this Court in *Cherokee*—to underscore that "[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." Pet. 22a (quoting *Ferris*, 27 Ct. Cl. at 546). The court of appeals also relied

upon *Dougherty*—also cited approvingly in *Cherokee*, 543 U.S. at 643—to underscore the distinction between "single-contract appropriations" (now called "line-item" appropriations) and "general" or "multi contract appropriations" (now, simply "lump-sum" appropriations): "'[W]e have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department.'" Pet. 22a-23a (quoting *Dougherty*, 18 Ct. Cl. at 503).

Based upon these binding authorities, the court of appeals concluded that, while "[i]t may be tempting to consider all tribes' claims to an appropriation collectively, to view tribal self-determination contract funds as a single line-item appropriation, and to assume that because funds were insufficient to pay all tribal contractors they were unavailable to [pay] each contractor, but *Cherokee*, *Ferris*, and *Dougherty* prohibit such analytical shortcuts." Pet. 23a.

Third, the court of appeals again drew upon *Cherokee* for the principle that "'if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose* or assumes other obligations that exhaust the funds.'" Pet. 17a, 24a (quoting *Cherokee*, 543 U.S. at 641; emphasis in *Cherokee*). Indeed, the court of appeals observed that "[i]n *Cherokee*, the Court considered an issue nearly identical to that under review," and that "[t]he Court agreed with

[Respondents], quoting the *Ferris* rule." Pet. 24a (citing *Cherokee*, 543 U.S. at 637-38).

As the court of appeals noted, in *Cherokee* this Court already rejected the government's construction of the ISDA's "subject to the availability of appropriations" clause, explaining that its function is not to cut off a contractor's rights when he is paid from a lump sum appropriation. Rather, the clause plays a *timing* function—to "make[ ] clear that an agency and contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until congress appropriates funds for that year." Pet. 25a (quoting *Cherokee*, 543 U.S. at 643). Thus in *Cherokee* "the 'subject to the availability of appropriations' language did not help the government '[s]ince Congress appropriated adequate unrestricted funds here.'" Pet. 25a (quoting *Cherokee*, 543 U.S. at 643). So, too, in this case "an agency's decision to allocate legally available funds to some other permissible purpose does not render an appropriation unavailable with respect to an ISDA contract." Pet. 25a. In other words, an agency's discretionary decision about how to spend or allocate funds—even if it is to pay other contractors—cannot convert an available appropriation which *could have paid* a contract into an unavailable appropriation which cannot pay the contract.

These three principles, all drawn from this Court's unanimous decision in *Cherokee*, readily disposed of the matter. First, each capped appropriation was a lump-sum appropriation, just as in *Cherokee*. Pet. 26a-27a. Second, the agency's decision to spend each appropriation down could not

alter the legal availability of the appropriation ab initio to pay the contractor in full—again, just as in *Cherokee*. Pet. 28a-29a. (The fact that the other spending was on similar contracts provides no "basis in logic" for a different outcome. Pet. 29a.) Third, "[i]n this case, as in *Cherokee*, there is no statutory restriction that would preclude the Secretary from using appropriated funds to pay full [contract support cost] need to the individual contractors bringing suit." Pet. 30a. Fourth, the fact that each appropriation here turned out to be insufficient to pay all contractors cannot overcome the principle from *Cherokee* that "'mutual self-awareness'" is insufficient to shift to any one contractor the risk that the appropriation will prove to be insufficient to pay all. Pet. 31a. Finally, the Circuit court noted that a system that leaves a contractor's payment rights in the hands of agency officials exercising "unfettered" (and, under *Lincoln*, unreviewable) discretion "sows uncertainty among contractors that could 'block the wheels of the Government.'" Pet. 32a (quoting *Dougherty*, 18 Ct. Cl. at 503).

Based upon these principles, the court of appeals disposed of the contrary decision reached by the Federal Circuit in *Arctic Slope*, along with decisions which predated this Court's seminal opinion in *Cherokee*. Pet. 34a-38a, 39a-40a. It also disposed of the government's Anti-Deficiency Act and Appropriations Clause arguments (also rejected in *Cherokee*). As to the former, the court of appeals observed that an ISDA contract is the very kind of contract that is expressly *excepted* from the Anti-Deficiency Act. Pet. 44a-45a (discussing 31 U.S.C. § 1341(a)(1)(B)). As to the latter, the court noted

that in *Cherokee*, 543 U.S. at 642-43, this Court already rejected the government's Appropriations Clause argument by reasoning that when an appropriation is fully spent without paying a contractor what he is due, a damages remedy lies and payment of any recovery is congressionally authorized in the Judgment Fund Act, 31 U.S.C. § 1304. Pet. 45a-46a.

ARGUMENT

I. THE DECISION BELOW DOES NOT WARRANT REVIEW BY THIS COURT.

The substantive issue presented here was correctly decided below under long established principles of federal contracting and appropriations law reaffirmed only six years ago in *Cherokee*. The court of appeals below carefully applied these principles. While the Federal Circuit reached a contrary ruling in *Arctic Slope Native Association* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *cert. pending*, (U.S. July 19, 2011) (No. 11-83), the fact that a sister Circuit has seriously misconstrued a decision of this Court does not warrant granting a Petition from a ruling which faithfully adheres to that decision.

To the extent Congress believes this Court in *Cherokee* misconstrued the ISDA, Congress is free to amend it or to alter the appropriations structure. Pet. 46a-47a. But here, indications are that Congress agrees with this Court. H.R. Rep. No. 112-151, at 42 (2011) ("The Committee believes that the

Bureau should pay all contract support costs for which it has contractually agreed and directs the Bureau to include the full cost of the contract support obligations in its fiscal year 2013 budget submission"), 98 (identical statement regarding Indian Health Service). Future liabilities are also unlikely if Congress continues to fully fund these contracts. *Id.* at 42 ("Contract support costs are fully funded at $228,000,000"). Congress's ability to alter the controlling rules if it so chooses, and the elimination of future liabilities for non-payment, are additional reasons not to hear this case.

The Petition should therefore be denied and the matter left to Congress.

That said, if the Court decides not to deny the Petition here and grants the Petition in *Arctic Slope*, the Court should not hold this Petition in abeyance but should instead grant the Petition here too. In this way, the Court will have the benefit of reviewing the issue presented in two different settings and with two different records.

II. THE GOVERNMENT'S PETITION SERIOUSLY MISCONSTRUES *CHEROKEE* AND OTHER CONTROLLING LAW

A. The Purpose of the Capped Appropriations Was Not to Reduce the Contract Obligation for Full Contract Support Costs But to Protect Non-Contracted Programs.

This Court in *Cherokee* anticipated statutory earmarks capping contract support cost appropria-

tions. The Court said that if the Secretary needed to protect a given fund, then the Secretary could "ask[] Congress in advance *to protect funds needed for more essential purposes with statutory earmarks.*" 543 U.S. at 642-43 (emphasis added). This is exactly the purpose of the statutory earmark capping contract support costs, and this is specifically confirmed in one of the early appropriations Act's legislative history:

> *In order to protect the Bureau's ability to provide services to those tribes who do not elect to contract* for a part or all of their programs, the Committee has retained bill language which establishes a limit of the amount of funding to be available for contract support.

S. Rep. No. 103-294, at 57 (1994) (emphasis added). This explanation, echoed by this Court in *Cherokee*, and this legislative history were omitted from the Petition. The government's suggestion that the real purpose was to cut off a contractor's right to full payment (Pet. 25-26) is wrong.[2]

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[2] That Congress would want to protect the remainder of the Secretary's appropriation, including operations benefiting other Tribes, is apparent from the fact that both the ISDA, 25 U.S.C. § 450j-1(b), and this Court's decision in *Lincoln* v. *Vigil*, 508 U.S. at 192 (1993), make plain that in the absence of earmarks fencing off the rest of an appropriation, the Secretary would have been free to reduce other operations in order to fund in full his contract obligations to all contractors.

B. The Government's Arguments Ignore the Principal Holding in *Cherokee*—That Indian Self-Determination Act Contracts Are Enforceable.

The government advances several arguments to overcome the decision below, all of which fail to heed this Court's teachings in *Cherokee*.

1. First, the government tries to paper over the fact that this case involves binding enforceable *contracts*. For instance, it says payment of these contracts is on a par with "funding for other federal programs," Pet. 3; that the Secretary is funding these contracts "like other agency programs," Pet. 6; that these contracts are really "[t]ribally administered federal programs" and as such "are not uniquely immune from the appropriations process," Pet. 13; and that paying the contracts cannot come "*at the expense of other priorities for the public* welfare," Pet. 13. See also Pet. 28 (characterizing this as a case about "the unlimited disbursement of public money at the expense of other priorities.") Along similar lines, it seeks to make this case into one about "funds ... for federal programs administered by tribes under the ISDA ... [and] the same programs administered by the Secretary directly." Pet. 20-21.

All this is but another way of saying that these are not contracts at all, and that what we are really dealing with is simply whether to fund some programs over other programs. But that argument was firmly rejected when the Court made plain that:

> Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the Act and ordinary contractual promises (say, those made in procurement contracts). The Act, for example, uses the word "contract" 426 times to describe the nature of the government's promise; and the word "contract" normally refers to "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty," Restatement (Second) of Contracts § 1 (1979).

543 U.S. at 639. The Court thus repudiated the government's notion that an ISDA contract is a "special" and "unique" instrument which puts the contractor "into the shoes of a federal agency" so that the contractor "enjoys no legal entitlement to receive promised amounts from Congress." *Id.* at 638.

Cherokee demonstrates again that where a contractor has performed services for the federal government, the law will enforce its right to be paid.[3]

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[3] See, *e.g.*, *Collins* v. *United States*, 15 Ct. Cl. 22, 35 (1879) (contract liabilities may be created where there is no appropriation of money to pay the obligations); *Gibney* v. *United States*, 114 Ct. Cl. 38, 50-53 (1949) (same); *Neal & Co.* v. *United States*, 19 Cl. Ct. 463, 471-73 (1990) (where federal contract provision is susceptible to more than one reasonable interpretation, ambiguity must be resolved in favor of the contractors); *Wetsel-Oviatt Lumber Co.* v. *United States*, 38 Fed. Cl. 563, 570-71 (1997) (government obliged to compensate fully contractor that had performed contract despite unavailability of appropriations); *AT&T Co.* v *United States*, 177 F.3d 1368, 1375-76 (Fed. Cir. 1999) (contractor entitled to be paid even though it proceeded with construction of a major defense

In *New York Airways* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966), a contractor who performed mail services for the government under implied-in-fact contracts was held entitled to damages for non-payment even though earmarked appropriations for the service proved insufficient. The governing statute contained a clause much like the one here. *Id.* at 745 ("The Board shall make payments of the remainder of the total compensation payable under this section *out of appropriations made to the Board for that purpose*") (emphasis added). And, the contractor had prior knowledge of the overall appropriations cap. *Id.* at 747 ("The carriers and the Board were aware of the legislated limitations.") The carriers prevailed. This Court twice cited *New York Airways* approvingly in *Cherokee*. 543 U.S. at 642, 643.

At bottom the government's position would allow one party to a contract to set the price after performance by the other. This defies ordinary contract principles long recognized by this Court. *Murray* v. *Charleston*, 96 U.S. 432, 445 (1877) (government's "promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity"). In fact, a "contract" where one party can vary the price is not a contract at all. That cannot be what Congress intended when it required the government to add the full contract support cost amount to each contract, 25 U.S.C. § 450j-1(g), and when it "use[d] the word 'contract' 426 times to

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system exceeding express statutory limits because "[a]n invalidation of a contract after it has been performed is not favored.").

describe the nature of the Government's promise." *Cherokee*, 543 U.S. at 639.

The government's argument, squarely rejected in *Cherokee*, creates a direct conflict between 25 U.S.C. § 450j-1(g) and § 450j-1(b) when none exists.

2. The government repeatedly tries to mischaracterize this suit as one to recover additional contract support costs through some secondary appropriation. *E.g.*, Pet. 9 (saying other courts have "rejected tribal demands for contract support costs in excess of the express statutory caps"), 11 (stating Respondents are seeking "excess" contract support costs "from the Judgment Fund"), 25 (discussing "[t]he court of appeals' theory, under which *every* tribal contractor could recover its reasonable costs from the Treasury" through the Judgment Fund).

The government's mischaracterization failed in *Cherokee*, and in rejecting it this Court made plain that if agency appropriations which could have paid the contractor are gone, the remedy is not a suit to secure additional contract payments from somewhere else, but a suit for *money damages* for breach of contract under 25 U.S.C. § 450m-1 and the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (formerly codified at 41 U.S.C. §§ 601-612). *Cherokee*, 543 U.S. at 642-43 (discussing "appropriate legal remedies arising because the government broke its contractual promise," and citing the Contract Disputes Act and the Judgment Fund). It is not a matter of seeking additional contract payments, but of seeking *damages* for the payments the government failed to make. (Obviously, when contract damage claims are

resolved after years of litigation, the original appropriation is always long gone. That fact never impedes the right to a damages recovery under the CDA.)

3. On a related note, the government argues that, since the Judgment Fund only covers situations where payment "'is not otherwise provided for,'" and since contract support costs are provided for in the agency operating appropriations, the Judgment Fund cannot be a source of payment for any judgment without "circumvent[ing]" the congressional cap. Pet. 18-19 (quoting 31 U.S.C. § 1304(a)). But this Court explained in *Cherokee* that a contractor may pursue "appropriate legal remedies" if the government breaks a "contractual promise," and in doing so the Court expressly referenced the Judgment Fund. *Cherokee*, 543 U.S. at 643. The "payment" that must not be "otherwise provided for" is the payment of "final judgments" for money damages, 31 U.S.C. § 1304(a), and "'unless otherwise provided by law, agency operating appropriations are not available to pay judgments against the United States.'" *Samish Indian Nation* v. *United States*, 657 F.3d 1330, 1341 (Fed Cir. 2011) (quoting 3 U.S. Government Accountability Office, *Principles of Federal Appropriations Law* 14-31 (3d ed. 2008)). As the court of appeals correctly observed (Pet. 45a), Congress's establishment of the Judgment Fund is a complete answer to the government's invocation of the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7.

4. The government adds atmospherics with the claim that "the problem [of insufficient appropriations] grows worse with every federal

budget cycle." Pet. 13. But the government is expected to seek sufficient funds to meet all its contract obligations, *Train* v. *City of New York*, 420 U.S. 35, 39 n.2 (1975), Congress is honoring this Court's judgment in *Cherokee* by providing the Secretary with sufficient monies to pay *all* of the BIA's contract support cost requirements. Congress is therefore capable of adjusting the appropriation so that future damage claims become unnecessary.

5. The government urges that Congress could not possibly have intended to design a system where contractors would have to sue to recover damages for underpayments caused by appropriations which Congress capped with a statutory earmark. Pet. 25-26. But as noted, supra, at 15, the purpose of these "statutory earmarks" was not to cut off liability, but "to protect funds." *Cherokee*, 543 U.S. at 642. The system that Congress designed requires that the contracts be fully funded, 25 U.S.C. § 450j-1(g), that the Secretary notify Congress mid-year for any deficiency appropriation if funds come up short, 25 U.S.C. § 450j-1(c), and that the Secretary ask for full funding in the first place, see, *e.g.*, H.R. Rep. No. 112-151, at 42, 98. It is only because the Secretary has failed to abide by these requirements that the enforcement mechanism Congress placed in the Act has been triggered.

6. The government's reliance on the Federal Circuit's decision in *Babbitt* v. *Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999) ("*Oglala*"), and the District of Columbia Circuit's decision in *Ramah Navajo School Board* v. *Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) is misplaced.

Pet. 13-16. Those decisions were rendered before this Court's unanimous *Cherokee* decision and can have force only if they are consistent with that decision—which they are not.

Further, *Ramah Navajo School Board* was an abuse-of-discretion case under the Administrative Procedure Act, not a breach-of-contract case, and it did not raise the contract law questions at issue here. Instead, it addressed the Secretary's lack of power to penalize a tribal contractor by reducing its contract payments when its indirect cost rate proposal was late. 87 F.3d at 1342-43 & n.5. Nonetheless, the Tenth Circuit carefully analyzed this decision, too, and likewise rejected its reasoning. Pet. App. at 19a-21a.

7. The government's repeated invocation of the Appropriations Clause is misplaced. First, a recovery of a damages award here does no violence to the Appropriations Clause because Congress always controls whether to pay such awards. Exercising that authority, Congress long ago enacted the Permanent and Indefinite Judgment Fund precisely for that purpose, 31 U.S.C. § 1304(a), and the Contract Disputes Act expressly refers to that congressional authority in addressing the payment of damage awards. 41 U.S.C. § 7108(a).

Similarly, the Anti-Deficiency Act is not a bar because (as the court of appeals correctly reasoned, supra 13), that Act expressly excepts the award of contracts that are "authorized by law," 31 U.S.C. § 1341(a)(1)(B). See also 2 U.S.C. § 622(2)(A) (distinguishing entitlement authority from obligation authority). If the ISDA is anything it is a

statute expressly authorizing—indeed, *directing*—the award of contracts before appropriations are made, 25 U.S.C. § 450f(a)(2), and mandating precisely how much money is to be specified. See, *e.g.*, 25 U.S.C. § 450j-1(g). This is why the government's reliance on *OPM* v. *Richmond*, 496 U.S. 414 (1990) is so misplaced, for that case concerned a mere estoppel claim by a federal employee who was given incorrect advice by a Navy official. Here, we are dealing with a claim that Congress expressly authorized to be brought under the Contract Disputes Act, 25 U.S.C. § 450m-1(a), and the controlling statute and contract documents mandated that the contract price "shall" include full contract support costs. 25 U.S.C. §§ 450j-1(g), 450*l*(c), Model Contract, sec. 1(a)(1) and 1(b)(4).

To revisit a foundational case like *Sutton* v. *United States*, 256 U.S. 575 (1921), as the government suggests (Pet. 27-28), and by necessary implication to revisit *Ferris* and *Dougherty* too, would upset over one hundred and twenty years of government contract law. These venerable precedents establish clear rules that control contractor rights and remedies in the case of (1) line-item appropriations specific to the contractor or project being contracted, and (2) lump-sum appropriations generic to hundreds of contractors or hundreds of projects being contracted. As compellingly demonstrated in the amicus brief of the U.S. Chamber of Commerce in *Arctic Slope*, a contrary ruling would be "highly destabilizing to government contracts." Amicus Br. 12. The reason is clear, for it would put contractors at the mercy of government agents deciding how much to pay and

how much not to pay, all the while leaving the contractor in the dark. This is because, absent a line-item appropriation telling the contractor about a limit on its contract or project, there is simply no way for the contractor to know what the agency is doing, how much he will be paid, and when, if at all, he should stop performance (assuming cessation were realistic).

The wildly differing payment levels that occurred in *Arctic Slope* (Pet. Br. 5) demonstrate vividly the extreme impact such a regime would have on contractor rights, a regime which would both severely discourage contracting and substantially increase the cost of contracting. It is these precise concerns which animated this Court's decision in *Cherokee*. 543 U.S. at 644 ("We believe it important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services.")

If Congress sees fit to adopt a different regime in the case of this particular class of contracts, it certainly knows how to fashion limitations putting contractors on clear notice prior to the commencement of any performance. See, *e.g.*, 25 U.S.C. § 2008(j)(2) (directing a prorated reduction in price). That Congress did not do so here should be the end of the matter.

8. An independent ground for affirming the decision below is that the government may not rely on a "funds available" clause to deny contract

liability where the contract does not expressly shift the risk of loss to the contractor and the Executive Branch fails to seek sufficient appropriations from Congress. *Cf. S.A. Healy Co.* v. *United States*, 576 F.2d 299, 300-301 (Ct. Cl. 1978). Although the court of appeals did not reach this argument, it is undisputed that the Executive Branch failed to request sufficient appropriations in any year at issue to meet its contract support cost obligations to all contractors. Cir. J.A. 231, 239, 506, 540-41, 1281, 1284, 1380, 1384, 1388, 1392, 1396, 1400-01, 1403-05. Worse yet, it failed to notify Congress of this insufficiency, Cir. J.A. 240-256, contrary to the ISDA's command. 25 U.S.C. § 450j-1(c).

C. The Government's Petition Misstates the Facts.

1. The government twists the statutory words "reasonable costs" in 25 U.S.C. § 450j-1(a)(2) to argue that the Respondents are simply seeking "every dollar requested," as if there were no standards and no contract price. Pet. 4, 8, 10, 12, 16, 18, 20 n.7, 27, 29. In fact, Respondents are seeking to enforce through a damages remedy their initial right to full payment of the "indirect costs" that were *fixed by the government*. Congress recognized the indirect cost rate-making process in the Act, 25 U.S.C. § 450b(f), (g), and these are the amounts which the ISDA says Respondents are "entitled to receive." 25 U.S.C. § 450j-1(a)(3)(B); *Ramah I*, 112 F.3d at 1463 n.8.

Contract price terms are frequently calculated by reference to an extrinsic standard such as this. See, *e.g.*, Uniform Commercial Code § 2-305 (recog-

nizing that contract price may "be fixed by an agreed market or other standard as set or recorded by a third person or agency"); *Family Snacks of North Carolina, Inc.* v. *Prepared Products Co.*, 295 F.3d 864-68 (8th Cir. 2002) (contract price to be determined according to "sophisticated and highly detailed 'cost plus' pricing formula"); *United Steel Paper & Forestry, Rubber, Mfg., Energy, Allied Indus & Serv. Workers Intern. Union* v. *Wise Alloys*, 642 F.3d 1344, 1347 (11th Cir. 2011) (price tied to Consumer Price Index). Such methods to determine a contract price do not make contracts unenforceable.

2. The government also mischaracterizes the annual BIA notices. Pet. 26. First and foremost, the notices, which were sent months after each fiscal year began, never informed Respondents they were going to be underpaid (and if so, by how much), and there was no other way for Respondents to independently find "the condition of the appropriation account at the Treasury," or to review "the contract book of the Department." *Dougherty*, 18 Cl. Ct. at 503. The notices merely alluded to a possible shortfall and spelled out a contingency plan for apportioning the remainder of the appropriation on a pro rata basis. They never stated that funds would run out and contract operations would need to stop.

In the end, Respondents only learned what they were going to get at the close of the fiscal year—when their performance was already complete and the government had received the benefit of the bargain. Cir. J.A. 265, 270, 276, 280-81, 288, 301-02, 305-06, 809, 811, 1186, 1188. To suggest that

Respondents should have retroactively rolled back performance to meet the reduced contract payment they got after performance was completed is nonsensical. Pet. 21 (citing 25 U.S.C. 450*l*(c), Model Contract, sec. 1(b)(4) and (c)(3).

3. The government also mischaracterizes one clause in one Oglala contract (but not its others, nor in Ramah's or Zuni's). Pet. 24. As the court of appeals correctly observed, the cited provision is "not an indication that the tribes were agreeing to limit the government's liability." Pet. 41a. Rather, "the most logical reading is that [the clause] is simply referring to the 75 percent to be paid up front by the BIA, established earlier in the agreement" where it is recited that the "balance of funds will be added as soon as it becomes available subject to congressional appropriation." Pet. 41a n.13. Even if one Oglala contract contained a term demanded by the government that was contrary to the ISDA, such a term would be unenforceable by the government under established contract law. *LaBarge Products, Inc.* v. *West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995); *MAPCO Alaska Petrol., Inc.* v. *United States*, 27 Fed. Cl. 405, 416 (1992), *abrogated on other grounds*, *Tesoro Hawaii Corp.* v. *United States*, 405 F.3d 1339 (Fed. Cir. 2005); *Appeal of Seldovia Village Tribe*, IBCA Nos. 3862 & 3863, 03-2 BCA ¶ 32400 (Oct. 20, 2003) (applying rule to ISDA contract).

CONCLUSION

For the foregoing reasons, Respondents respectfully suggest that the Court deny the Petition in this case and grant the petition in *Arctic Slope*, together with an order summarily reversing the

Federal Circuit's decision in *Arctic Slope* in light of *Cherokee*. But if the Court decides not to deny the Petition here and also to grant the Petition in *Arctic Slope*, the Court should not hold this Petition in abeyance but should instead grant the Petition here too. In this way, the Court will have the benefit of reviewing the issue presented in two different settings and with two different records. Counsel for Petitioner in *Arctic Slope* concurs.

Respectfully submitted.

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REPLY BRIEF

No. 11-551

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Each year for more than 15 years, Congress has imposed a firm statutory ceiling on the appropriations available to the Secretary of the Interior to pay contract support costs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.* Respondents acknowledge that Congress thus "capped" the relevant appropriation for each fiscal year at the "stated sum" (Br. in Opp. 6), and it is undisputed that those sums have never been large enough to satisfy all tribal claims for contract support costs. Nevertheless, the Tenth Circuit ruled that, because Congress in each fiscal year appropriated sufficient funds to meet the needs of any *one* tribal contractor considered in isolation, the government must pay *all* of the contract support costs claimed by *every* tribal contractor—even though the clear result is to exceed the statutory appropriations limits imposed by Congress. That decision

contravenes fundamental separation-of-powers principles embodied in the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and reinforced in the Anti-Deficiency Act, 31 U.S.C. 1341; disregards the plain language of the ISDA; and conflicts with prior holdings of the D.C. and Federal Circuits. The petition for a writ of certiorari should be granted.

I. THIS COURT'S REVIEW IS WARRANTED

A. Respondents do not seriously dispute that the question presented warrants this Court's review. They agree that the holding of the court below irreconcilably conflicts with the Federal Circuit's decision in *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (2010), petition for cert. pending, No. 11-83 (filed July 18, 2011) (*Arctic Slope*). Br. in Opp. 14. They agree that the authority of Congress to limit the government's contractual liability through the exercise of its appropriations power is a question of great practical significance. See *id.* at 24-25. And they do not deny that this case provides an appropriate vehicle for the Court's resolution of that important question.

Respondents briefly suggest (Br. in Opp. 14-15) that the Court should deny review because there are "indications" in a single House committee report accompanying a proposed appropriations bill that Congress may provide full funding for tribal contract support costs in fiscal year (FY) 2012. See H.R. Rep. No. 151, 112th Cong., 1st Sess. 42 (2011). That argument is without merit. Like every annual appropriations act for the Department of the Interior since 1994, the proposed appropriations bill for FY 2012 includes a "not to exceed" statutory cap on the funds available to pay contract support costs under the ISDA. See H.R. 2584, 112th Cong., 1st Sess. 24 (2011). The legal effect of such a statutory appropriations cap is the very question that has

divided the courts of appeals. Moreover, even if Congress were ultimately to approve sufficient funds to cover all tribal claims for contract support costs in FY 2012, that would have no effect on the more than $1 billion in accumulated tribal claims for such costs from previous fiscal years. See Pet. 29. Nor would it prevent Congress from capping the available funding at lower levels in the future. Particularly in the present economic climate, there is no serious doubt that the authority of Congress to impose—and the obligation of courts to respect—explicit statutory spending limits is a question of significant prospective importance.

B. Respondents devote most of their brief (Br. in Opp. 15-28) to defending the Tenth Circuit's decision on the merits. Their arguments reflect the same fundamental errors that pervade the court of appeals' decision, see Pet. 19-27, and serve only to highlight the need for this Court's intervention.

1. Respondents' principal argument is that the decision below was compelled by this Court's decision in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*). See, *e.g.*, Br. in Opp. 12-13, 14, 17-20. But as the petition explains, *Cherokee* involved the government's liability for contract support costs under an *unrestricted* appropriation. See Pet. 4-6, 17-18. In holding that the government could properly be held liable in that case for contract support costs that the Indian Health Service did "not deny that it promised to pay," the Court repeatedly stressed that Congress had "appropriated sufficient *legally unrestricted* funds to pay the contracts at issue." 543 U.S. at 636, 637 (emphasis added). Indeed, in rejecting the arguments advanced by the government, the Court referred at least eight times to the fact that Congress had placed no statutory restriction

on the Secretary's ability to reprogram other appropriated funds in order to satisfy the tribes' claims.[1]

Cherokee consequently did not address, let alone "squarely reject[]" (Br. in Opp. 20), the government's arguments here. To the contrary, the Court concluded that the ISDA's express reservation of congressional control over appropriations, 25 U.S.C. 450j-1(b), was irrelevant precisely because Congress had provided "adequate unrestricted funds" to pay the claims at issue. 543 U.S. at 643. Here, by contrast, it is undisputed that Congress has "capp[ed] appropriations at a level well below the sum total" of all tribal claims for contract support costs in every fiscal year since 1994. Pet. App. 2a. As the petition explains, those annual appropriations caps reflect a judgment by Congress that funding for ISDA contract support costs should not jeopardize other federal legislative priorities, including other programs benefitting Indians and Indian tribes. Pet. 28. Difficult funding decisions of that kind involve quintessentially legislative judgments that are committed to Congress un-

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[1] See *Cherokee*, 543 U.S. at 637 ("These appropriation Acts contained no relevant statutory restriction."); *ibid.* (discussing the applicable rule when "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue"); *id.* at 640 (discussing "who should bear the risk that an unrestricted lump-sum appropriation would prove insufficient" to pay all claimants); *id.* at 641 (noting that "the relevant congressional appropriations contained *other* unrestricted funds, small in amount but sufficient to pay the claims at issue"); *ibid.* (rejecting the argument that certain "funds, though legally unrestricted (as far as the appropriations statutes' language is concerned), were nonetheless unavailable" to the tribes); *id.* at 642 (recognizing that Congress may "protect funds needed for more essential purposes with *statutory* earmarks"); *id.* at 643 (concluding that the ISDA's availability of funds provision was irrelevant because "Congress appropriated adequate unrestricted funds here"); *id.* at 647 (emphasizing that Congress "unambiguously provided unrestricted lump-sum appropriations").

der the Appropriations Clause. U.S. Const. Art. I, § 9, Cl. 7. This Court's intervention is needed to correct the Tenth Circuit's erroneous holding that Congress "breach[es]" an enforceable "guarantee[]" to tribes (Pet. App. 45a) when it exercises its expressly reserved constitutional authority to control the expenditure of public funds under the ISDA.

2. Respondents' remaining arguments likewise underscore the need for this Court's review. Echoing the reasoning of the court of appeals, respondents insist that the ISDA creates a "statutory right to have [contract support] costs fully funded." Br. in Opp. 3. But as the petition explains (Pet. 20-23), that proposition is demonstrably wrong and has been rejected by every other court of appeals that has considered the question. The statutory provision on which respondents rely, 25 U.S.C. 450j-1(a)(2), provides only that the contract must include "*an amount for*" the contractor's reasonable costs, not that it must cover *all* such costs.[2] And in any event, the Act elsewhere makes clear that nothing in the ISDA guarantees to tribes any particular level of federal funding. See Pet. 21-22. In particular, Section 450j-1(b) provides that *all* funding under the ISDA is subject to Congress's plenary control over federal spending:

> *Notwithstanding any other provision in this [Act]*, the provision of funds under this [Act] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or

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[2] Respondents' contention that the ISDA provides a "mathematically determinable" (Br. in Opp. 4) amount of contract support costs is at odds with the statute itself, which contemplates, *inter alia*, negotiations between the Secretary and the tribal contractor to identify "reasonable and allowable costs" and to ensure that contract support costs do not "duplicate" amounts already provided as part of the program funding. See, *e.g.*, 25 U.S.C. 450j-1(a)(3).

> activities serving a tribe to make funds available to another tribe or tribal organization under this [Act].

25 U.S.C. 450j-1(b) (emphasis added). See Pet. 21-22.

Like the court of appeals below, respondents make no attempt to reconcile their belief that the ISDA creates a "statutory right" to "full[] fund[ing]" of contract support costs (Br. in Opp. 3) with the plain language of Section 450j-1(b). See *Arctic Slope*, 629 F.3d at 1304 (Section 450j-1(b) "limits the Secretary's obligation to the tribes to the appropriated amount"); *Shoshone-Bannock Tribes* v. *Secretary, Dep't of Health and Human Servs.*, 279 F.3d 660, 667 (9th Cir. 2002) (tribes' claim of "entitlement" to funding for contract support costs "cannot withstand" the reservation of congressional authority in Section 450j-1(b)); *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1380 (Fed. Cir. 1999) ("The unequivocal statutory language prevents [an ISDA contractor] from asserting that it was entitled to full funding as a matter of right."), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[I]f the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds."); see also Pet. App. 82a (Hartz, J., dissenting) ("[T]he ISDA does not require full payment. Full payment is conditioned on the availability of funds.").

3. For similar reasons, respondents' objection that "this case involves binding enforceable *contracts*" (Br. in Opp. 17) misses the point. The question in this case is not whether a contractual bargain exists, but the content of the bargain itself. The Secretary did not promise to pay respondents' contract support costs irrespective of the availability of appropriations. Respondents point to nothing in the statute or any contract with the Secretary even hinting at such an agreement. Cf. 25 U.S.C. 450j-1(b). Indeed, under set-

tled precedent from this Court, the Secretary could not have validly made such a promise: absent a special grant of statutory authority absent here, a government official is "without power" to bind the government "to pay more than the amount appropriated." *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); see 31 U.S.C. 1301(d) ("A law may be construed * * * to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states * * * that such a contract may be made."). The ISDA's "subject to the availability of appropriations" proviso, 25 U.S.C. 450j-1(b), makes clear that no such power is conferred on the Secretary. See *Cherokee*, 543 U.S. at 643. And as this Court has emphasized, "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM* v. *Richmond*, 496 U.S. 414, 430 (1990) (citing the Anti-Deficiency Act, 31 U.S.C. 1341, 1350).

Because the Secretary did not promise to provide funding irrespective of appropriations, respondents have no contractual claim for amounts in excess of the statutory appropriations caps. Respondents do not suggest that there are unrestricted funds available to the Secretary to satisfy their demands, as there were in *Cherokee*. Their argument is simply that the Secretary breached a contractual promise by declining to do what the Anti-Deficiency Act prohibits: disburse funds from the Treasury in excess of the appropriations authorized by Congress.[3] 31 U.S.C.

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[3] Respondents mistakenly argue that the Anti-Deficiency Act is irrelevant because ISDA contracts may be (and generally are) executed in advance of appropriations. Br. in Opp. 23-24 (citing 31 U.S.C. 1341(a)(1)(B)). This confuses two different prohibitions in the Anti-Deficiency Act. The Tenth Circuit's decision is at odds with the Act not because self-determination contracts are signed before the fiscal year

1341(a)(1)(A); see 31 U.S.C. 1350 (criminal prohibition). The Secretary could not and did not make such a promise. Nor was the Secretary required to take funding for contract support costs away from one tribal contractor to satisfy the demands of others: the ISDA expressly relieves the Secretary of any such obligation. See 25 U.S.C. 450j-1(b).

4. Equally extraordinary is respondents' contention that the Tenth Circuit's decision "does no violence to the Appropriations Clause" (Br. in Opp. 23) because the Judgment Fund, 31 U.S.C. 1304, is available to pay "damages" for Congress's failure to provide respondents' desired level of funding. See Br. in Opp. 20-21, 23. As the petition explains (at 18-19), the Judgment Fund is not a back-up source of agency appropriations, nor does it permit litigants to circumvent explicit statutory restrictions imposed by Congress on the amount and use of public funds for particular purposes. Respondents' arguments on this score only confirm that the Tenth Circuit's decision renders the statutory caps imposed by Congress a nullity.

Respondents contend that the Judgment Fund is available to underwrite their contract support costs because the ISDA permits breach-of-contract actions to proceed under the Contract Disputes Act, and money judgments entered in such actions are payable from the Judgment Fund. Br.

---

begins, cf. *Cherokee*, 543 U.S. at 643, but because the Act separately provides that no government officer or employee may "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. 1341(a)(1)(A). In other words, the Secretary can execute an ISDA contract in advance of the relevant fiscal year, but the Secretary *cannot* promise in that contract to pay more than the amount that Congress actually appropriates. Yet that is exactly what respondents contend—and the Tenth Circuit held—that the Secretary did here.

in Opp. 20, 23; see 25 U.S.C. 450m-1(d); Act of Jan. 4, 2011, Pub. L. No. 111-350, sec. 3, § 7108, 124 Stat. 3825 (to be codified at 41 U.S.C. 7108). But that argument erroneously presupposes that the Secretary breached a contractual obligation in the first place by refusing to pay money that Congress had not authorized to be paid. See pp. 6-8, *supra*. Because there is no such promise and no breach, there is no basis for a judgment to be paid from the Judgment Fund.

Congress acted with unmistakable clarity in restricting the amount of money that may be drawn from the Treasury for ISDA contract support costs. The Tenth Circuit's decision, which permits respondents to recover from the Judgment Fund the funding that they believe Congress should have appropriated to the Secretary in the first instance, warrants this Court's review.

C. Finally, respondents suggest that the Court may affirm the judgment below on the alternative ground that the Executive Branch "failed" (Br. in Opp. 26) to request sufficient appropriations from Congress to cover all of respondents' contract support costs or to provide Congress with adequate notice of funding shortfalls. That contention, which was not addressed by the majority below or by the district court, is without merit. See Pet. App. 84a-86a (Hartz, J., dissenting); see also *Arctic Slope*, 629 F.3d at 1305-1306 (rejecting the same argument). The statutory appropriations caps are themselves proof that Congress was well aware of respondents' mounting claims for contract support costs and declined to fund them in full.

II. THIS CASE PROVIDES THE BETTER VEHICLE FOR THE COURT'S REVIEW.

As the government's petition for a writ of certiorari explains (at 29-30), this case provides the better vehicle for the Court's resolution of the question presented. Respon-

dents suggest (Br. in Opp. 29) that the Court should grant review in *Arctic Slope*, No. 11-83, as well. But as respondents do not dispute, the sole tribal contractor in that case received all of the funding for contract support costs that was specifically contemplated in its annual funding agreements, entirely apart from any question of the sufficiency of appropriations. See 629 F.3d at 1300-1301. The Court could thus potentially conclude in that case that it was unnecessary to reach the question presented.

This case, by contrast, involves a nationwide class action, and it is undisputed that the Secretary could not satisfy the contract support cost demands of all members of the respondent class in any fiscal year without exceeding the statutory appropriations cap imposed by Congress. The case thus squarely presents the question that the court of appeals concluded was dispositive (Pet. App. 29a-30a): whether the government is liable for *all* of the contract support costs of *all* tribal contractors, irrespective of a statutory appropriations cap, merely because Congress provided sufficient funds to satisfy the claim of any single contractor considered in isolation. But if the Court concluded that its consideration of the issues presented would benefit from granting review of *Arctic Slope* as well, we of course would urge it to do so.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2011

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 17 2012
OFFICE OF THE CLERK

No. 11-551

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 31, 2011
CERTIORARI GRANTED: JAN. 6, 2012

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket No. 08-2262

RAMAH NAVAJO CHAPTER, ET AL.

v.

SALAZAR, ET AL.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/29/08	[9608243] Civil case docketed. Preliminary record filed. DATE RECEIVED: 10/27/2008 Docketing statement due 11/13/2008 for Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter. Transcript order form due 11/13/2008 for Michael P. Gross. Notice of appearance due on 11/13/2008 for Eddie Brown, Dirk Kempthorne, Oglala Sioux Tribe, Marvin Pierce, Pueblo of Zuni, Ramah Navajo Chapter and United States of America.
	* * * * *
11/13/08	[9611974] Docketing statement filed by Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter. Served on 11/13/2008. Manner of Service: email.

DATE	PROCEEDINGS
11/13/08	[9612026] Filed notice record is complete. Served on 11/13/2008. Appellants' brief and appendix due on 12/23/2008 for Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter.
	* * * * *
12/18/08	[9620449] On the court's own motion and pursuant to 10th Cir. R. 33.1, order filed by (CLK) extending time to file appellant's brief by 87 days until 03/20/2009. Appellant's brief and appendix due on 03/20/2009 for Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter.
3/2/09	[9638412] On the court's own motion and pursuant to 10th Cir. R. 33.1, order filed by (CLK) extending time to file appellants' brief until 04/20/2009. Appellants brief and appendix due on 04/20/2009 for Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter.
	* * * * *
4/10/09	[9649496] Order filed by Clerk of the Court granting appellants' motion for extension of time to file their brief in chief to 05/11/2009 for Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter. Served on 04/10/2009.

DATE	PROCEEDINGS
5/7/09	[9657524] Appellants' brief filed by Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter. Original and 7 copies.. Served on 05/07/2009 by email. Oral argument requested? y. Appendix filed. Original and 1 copy. Appendix pages: 1490. Number of volumes: 7. Appendix also has a Statues and Regulations Pamphlet with it (40 pages). Appellee's brief due 06/11/2009 for Dirk Kempthorne, Eddie Brown, Marvin Pierce and United States of America.
5/14/09	[9659726] Amicus Curiae brief filed by National Congress of American Indians. Original and 6 copies. Served on 05/14/2009. Manner of Service: US mail.
6/11/09	[9666728] Appellee/Respondent's brief filed by Mr. Eddie Brown, Dirk Kempthorne, Mr. Marvin Pierce and United States of America. Original and 7 copies. Served on: 06/11/2009. Manner of service: US mail, ECF/NDA. Oral argument requested? Yes.—[Edited 06/12/2009 by SLS to correct number of copies to 7.] JSK
6/12/09	[9666903] Minute order filed - Appellants' optional reply brief due 06/29/2009 by Ramah Navajo Chapter, Oglala Sioux Tribe and Pueblo of Zuni. (Text Only - No Attachment)

DATE	PROCEEDINGS

* * * * *

6/19/09	[9668667] Order filed by Clerk of the Court granting appellants' motion for extension of time to file apet reply brief to 07/13/2009 by Ramah Navajo Chapter, Oglala Sioux Tribe and Pueblo of Zuni. No further extensions will be granted on the clerk's authority. Served on 06/19/2009.
7/13/09	[9674816] Appellants' reply brief filed by Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter. Original and 7 copies. Served on 07/13/2009. Manner of Service: clerk, FedEx.—[Edited 07/14/2009 by SLS to correct number of copies and method of service.] MPG
9/21/09	[9694216] Calendar notice sent to counsel. Arguments to be held Monday, November 16, 2009, at 1:00pm in Byron White U.S. Courthouse, Courtroom II, Denver, Colorado. Counsel is required to go to http://www.ca10.uscourts.gov under the argument calendar tab to obtain an important notice regarding calendared cases and required forms. Counsel for Amici Curiae do not argue without special permission of the court. Counsel for these parties do not need to file a calendar acknowledgment form unless permission to argue has been granted by order of the court. The calen-

DATE	PROCEEDINGS
	dar acknowledgment form (and the custody status form when applicable) must be completed and filed with the clerk via Electronic Case Filing within 10 days of today's date.
	* * * * *
11/16/09	[9711529] Case argued by Michael Gross for appellant, and by Joh Koppel for appellee; Submitted to Judges Lucero, McKay and Hartz.
12/15/10	[9824404] Supplemental authority filed by Mr. Eddie Brown, Dirk Kempthorne, Mr. Marvin Pierce and United States of America. Served on 12/15/2010. Manner of Service: ECF/NDA. JSK
12/21/10	[9825811] Reply filed by Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter to Appellees' Rule 28(j) letter. Served on 12/21/2010. Manner of Service: ECF/NDA. MPG
12/22/10	[9826502] Order filed by Judges Lucero, McKay and Hartz - The parties are directed to currently file supplemental briefs of no more than 15 pages in length addressing Arctic Slope Native Association, Ltd. v. Sebelius, No. 2010-1013, __ F.3d __ (Fed. Cir., Dec 15, 2010), and the cases cited therein, particularly Winston Bros.

DATE	PROCEEDINGS
	Co. v. United States, 131 Ct. Cl. 245 (1955), and C.H. Leavell & Co. v. United States, 208 Ct. Cl. 776 (1976). The supplemental briefs shall be filed on or by January 11, 2011. Served on 12/22/2010.
	* * * * *
12/30/10	[9828007] Order filed by Judges Lucero, McKay and Hartz granting - Attorney motion for leave to file supplemental briefs. The supplemental briefs shall be filed on or by 01/25/2011. Served on 12/30/2010.
1/25/11	[9834918] Appellant's supplemental brief filed by Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter. 7 paper copies to be provided to the court. Served on 01/25/2011. Manner of Service: ECF/NDA. MPG
1/25/11	[9834946] Appellee/Respondent's supplemental brief filed by Mr. Eddie Brown, Dirk Kempthorne, Mr. Marvin Pierce and United States of America. 7 paper copies to be provided to the court. Served on 01/25/2011. Manner of Service: ECF/NDA. JSK
5/9/11	[9864815] Reversed and remanded; Terminated on the merits after oral hearing; Written, signed, published; Judges Lucero (author), McKay and Hartz (dissenting).

DATE	PROCEEDINGS
	Mandate to issue.—[Edited 05/09/2011 by KLP]
5/9/11	[9864819] Judgment for opinion filed.
6/23/11	[9878470] Petition for rehearing en banc, for rehearing filed by Mr. Eddie Brown, Dirk Kempthorne, Mr. Marvin Pierce and United States of America. Original and 18 copies. Served on 06/23/2011. Manner of Service: ECF/NDA. [08-2262] JSK
6/24/11	[9878881] Order filed by Judges Lucero, McKay and Hartz - Appellant shall file a response to appellees' petition for rehearing and rehearing en banc on or before July 5, 2011. Response due on 07/05/2011 for Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter. Served on 06/24/2011.
	* * * * *
7/5/11	[9881155] Order filed by Judges Lucero, McKay and Hartz granting appellants' unopposed motion for enlargement of time to respond to appellees' petition for rehearing and rehearing en banc to 07/19/2011 for Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter. Served on 07/05/2011.

DATE	PROCEEDINGS
7/19/11	[9885854] Response filed by Oglala Sioux Tribe, Pueblo of Zuni and Ramah Navajo Chapter to Appellees' Petition for Rehearing or Rehearing En Banc. Served on 07/19/2011. Manner of Service: ECF/NDA. MPG
	* * * * *
8/1/11	[9889584] Order filed by Judges Lucero, McKay and Hartz denying appellees' petition for rehearing and rehearing en banc.
8/5/11	[9891066] Case file closed.
8/9/11	[9891785] Mandate issued.
10/24/11	[9912859] Supreme court order granting an extension of time, until 11/14/11, for the parties to file a writ of certiorari with the Supreme Court. (Supreme Court Application No. 11A408).
10/31/11	[9932538] Petition for writ of certiorari filed by Ken Salazar on 10/31/2011. Supreme Court Number 11-551.
1/9/12	[9932533] Supreme court order dated 01/06/2012 granting certiorari filed.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW MEXICO

No. 1:90-cv-00957-LH-KBM

RAMAH NAVAJO CHAPTER

v.

LUJAN, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/4/90	1	COMPLAINT (5 Summons(es) issued) (jm) (Entered: 12/18/1990)
		* * * * *
1/2/91	14	FIRST AMENDED COMPLAINT [1-1] by plaintiff (jm) Modified on 01/04/1991 (Entered: 01/02/1991)
		* * * * *
2/13/91	19	ANSWER by defendant Manuel Lujan to First Amended Complaint [14-1] (former employee) (Entered: 02/22/1991)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/21/91	31	MOTION by pltf to certify class (jm) (Entered: 08/22/1991)
		* * * * *
9/13/91	36	RESPONSE by federal defts to motion to certify class [31-1] (jm) (Entered: 09/17/1991)
		* * * * *
9/20/1991	38	REPLY by plaintiff Ramah Navajo Chapter to response to motion to certify class [31-1] (db) (Entered: 09/23/1991)
		* * * * *
10/8/92	86	MINUTE ORDER: transferring case from Judge Santiago E. Campos to the Albuquerque Division and reassigning case to Judge C. LeRoy Hansen (cc: all counsel) (pg) (Entered: 10/08/1992)
		* * * * *
10/1/93	95	MEMORANDUM OPINION by Judge C. LeRoy Hansen granting motion to certify class [31-1] (cc: all counsel) (order to

DATE	DOCKET NUMBER	PROCEEDINGS
		follow) (former employee) (Entered: 10/01/1993)
10/1/93	96	ORDER by Judge C. LeRoy Hansen granting motion to certify class. Plaintiff class shall include those Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act [31-1] (cc: all counsel) (former employee) (Entered: 10/01/1993)
		* * * * *
11/4/93	104	ORDER by Judge C. LeRoy Hansen denying pltf's motion for partial summary judgment [57-1] granting deft's motion for summary judgment on liability and declaratory judgment [73-1] (cc: all counsel) (former employee) (Entered: 11/08/1993)
11/4/93	105	MEMORANDUM OPINION: by Judge C. LeRoy Hansen re [73-1], re [57-1] (see order of

DATE	DOCKET NUMBER	PROCEEDINGS
		11/4/93 (cc: all counsel) (former employee) (Entered: 11/09/1993)
		* * * * *
10/18/94	150	FINAL JUDGMENT by Judge C. LeRoy Hansen. The memorandum opinion and order of 11/4/93 is incorporated in this final judgment and as further described herein dismissing case (cc: all counsel) (former employee) (Entered: 10/19/1994)
		* * * * *
11/16/94	152	NOTICE OF APPEAL by plaintiff Ramah Navajo Chapter from Dist. Court decision, [150-2] ; Fees $105.00 receipt 70571-Distribution as required. (cc: all counsel) (former employee) (Entered: 11/18/1994)
		* * * * *
12/9/94		COMPLETE TRANSCRIPT of proceedings of date(s): 10/18/94 (re [151- 1]) (re [152-1]) # of volumes: 1; lodged in

DATE	DOCKET NUMBER	PROCEEDINGS
		separate file folder (former employee) (Entered: 12/28/1994)
12/28/94		COMPLETE TRANSCRIPT of proceedings of date(s): 10/29/93 (re [152- 1]) # of volumes: 1; lodged in separate file folder (mk) Modified on 01/31/1995 (Entered: 01/11/1995)
		* * * * *
7/10/97	157	COPY of judgment from USCA reversing and remanding the Decision of the District Court [Appeal [152-1] (dmw) (Entered: 07/10/1997)
		* * * * *
8/26/97	162	ORDER by Chief Magistrate William Deaton setting settlement conference on 10/1/97 at 2:00 pm (cc: all counsel) (dmw) (Entered: 08/26/1997)
10/30/97	163	JOINT MOTION by parties herein for order to permit resumption of indirect cost rate negotiations (jrm) (Entered: 10/31/1997)

DATE	DOCKET NUMBER	PROCEEDINGS
11/4/97	164	ORDER by Judge C. LeRoy Hansen granting the joint mtn for order to permit resumption of indirect cost rate negotiations [163-1] see order for specifics (cc: all counsel) (kd) (Entered: 11/05/1997)
		* * * * *
12/18/97	174	MEMORANDUM, OPINION, AND ORDER by Chief Magistrate William Deaton vacating Dec 31, 1997 settlement conference and setting a report date of feb 2, 1998 at 8:30 am (cc: all counsel electronically) (jrm) Modified on 12/22/1997 (Entered: 12/19/1997)
		* * * * *
8/31/98	195	JOINT MOTION for preliminary & final approval of partial settlement agreement & order that notice be sent to the class (dmw) (Entered: 09/01/1998)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/8/98	197	ORDER by Judge C. LeRoy Hansen granting joint motion for preliminary & final approval of partial settlement agreement & order that notice be sent to the class; evidentiary hearing set on 12/2/98 at 1:30 pm [195-1] (cc: all counsel) (dmw) (Entered: 09/08/1998)
		* * * * *
9/22/98	199	PARTIES STIPULATED ORDER regarding equitable relief by Chief Judge John E. Conway as described herein (cc: all counsel) (jrm) (Entered: 09/22/1998)
		* * * * *
12/16/1998	266	CLERK'S MINUTES: before Judge C. LeRoy Hansen Proposed partial settlement agreement hearing held 12/16/98 C/R: F. Donica (dmw) (Entered: 12/21/1998)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
1/27/99	274	STIPULATED ORDER by Judge C. LeRoy Hansen re objections, as described herein (see order for specifics) [221-1] (cc: all counsel) (dmw) (Entered: 04/21/1999)
2/10/99	275	ORDER by Chief Magistrate William Deaton setting settlement conference on 4/23/99 at 9:00 am with pltf, defts Siletz Tribe & White Mountain Tribe only (cc: all counsel, electronically) (dmw) (Entered: 02/11/1999)
		* * * * *
5/13/99	282	STIPULATION of the parties as to judgment amount (kd) (Entered: 05/13/1999)
5/13/99	283	STIPULATION of the parties re partial settlement agreement (kd) (Entered: 05/13/1999)
5/14/99	284	MEMORANDUM OPINION: by Judge C. LeRoy Hansen granting in part & denying in part class counsel's motion for an award of attorney fees and

DATE	DOCKET NUMBER	PROCEEDINGS
		costs [201-1], making findings of fact & conclusios of law & approving partial settlement agreement [195-1], as further described herein (cc: all counsel, electronically) (dmw) Modified on 06/08/1999 (Entered: 05/14/1999)
5/14/99	285	ORDER & PARTIAL FINAL JUDGMENT by Judge C. LeRoy Hansen, as further described herein (cc: all counsel, electronically) (dmw) Modified on 05/14/1999 (Entered: 05/14/1999)
		* * * * *
5/25/99	287	AMENDED ORDER AND PARTIAL FINAL JUDGMENT by Judge C. LeRoy Hansen approving partial settlement agreement & awarding pltf Ramah Navajo Chapter & pltf class against defts a total of $79,903,529 plus post judgment interest, as further described herein (cc: all counsel) (dmw) (Entered: 05/25/1999)

DATE	DOCKET NUMBER	PROCEEDINGS
5/25/99	288	ORDER by Judge C. LeRoy Hansen granting joint motion to amend order & partial final judgment [286-1] (cc: all counsel) (dmw) (Entered: 05/25/1999)
		* * * * *
6/3/99	290	PARTIAL FINAL JUDGMENT by Judge C. LeRoy Hansen in favor of the Siletz Tribe against defts in the amount of $150,000.00 plus prejudgment interest of $7,701.15, plus post judgment interest at the variable rate, as further described herein (cc: all counsel, electronically) (dmw) Modified on 06/08/1999 (Entered: 06/03/1999)
6/8/99	291	ORDER by Judge C. LeRoy Hansen granting pltf's motion for order to publish the Memorandum Opinion and Order of 5/14/99 and Nunc Pro Tunc Order of 5/25/99 [289-1] (cc: all counsel) (dmw) (Entered: 06/09/1999)

DATE	DOCKET NUMBER	PROCEEDINGS
6/22/99	292	JUDGMENT (partial final): by Judge C. LeRoy Hansen in favor of White Mountain Apache Tribe under Rule 54(b) for fiscal years 1989-1993 in the amount of $590,729.00 as of 6/22/99 plus post judgment interest and as further described herein (cc: all counsel, electronically) (dmw) (Entered: 06/23/1999)
		* * * * *
6/28/99	294	MOTION by intervenor Oglala Sioux Tribe to intervene (mjr) (Entered: 06/28/1999)
6/28/99	294	MEMORANDUM by intervenor in support of motion to intervene [294-1] (mjr) (Entered: 06/28/1999)
6/28/99	295	MOTION by plaintiff Ramah Navajo Chapter to amend the complaint (mjr) (Entered: 06/28/1999)
6/28/99	295	MEMORANDUM by plaintiff Ramah Navajo Chapter in support of motion to amend the

DATE	DOCKET NUMBER	PROCEEDINGS
		complaint [295-1] (mjr) (Entered: 06/28/1999)
		* * * * *
7/16/99	299	JOINT MOTION by pltf Ramah Navajo Chapter and defts for order to set date for payment of partial final judgment (ild) (Entered: 07/20/1999)
7/21/99	300	PARTIAL SUMMARY JUDGMENT by Judge C. LeRoy Hansen in favor of Eastern Shoshone Tribe in the amount of $11,000.00 plus prejudgment interest of $536.70, plus post-judgment interest, as further described herein (cc: all counsel) (dmw) (Entered: 07/21/1999)
7/21/99	301	ORDER by Judge C. LeRoy Hansen setting date of 9/15/99 for payment of partial final judgment (cc: all counsel) (dmw) (Entered: 07/21/1999)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/5/99	313	RESPONSE IN OPPOSITION by defts to Ramah Navajo Chapter's motion to amend the complaint [295-1] and to Oglala Sioux Tribe's motion to intervene [294-1] (ild) (Entered: 08/06/1999)
		* * * * *
8/13/99	321	STIPULATED ORDER by Judge C. LeRoy Hansen approving agreement for deposit, investment & disbursement of monies paid to the Clerk of the Court pursuant to partial final judgments of the Court, as further described herein [287-1] [290-1] [292-1] [300-1] (cc: all counsel) (dmw) (Entered: 08/16/1999)
8/13/99	322	ORDER by Judge C. LeRoy Hansen re funds on deposit, as further described herein (cc: all counsel) (dmw) (Entered: 08/16/1999)
8/13/99	323	ORDER by Judge C. LeRoy Hansen authorizing transfer of accountabililty for registry

DATE	DOCKET NUMBER	PROCEEDINGS
		funds, as further described herein (cc: all counsel) (dmw) (Entered: 08/16/1999)
		* * * * *
8/19/99	328	CONSOLODATED REPLY by plaintiff Ramah Navajo Chapter and intervenor Oglala Sioux Tribe to response to motion to amend the complaint [295-1] and motion to intervene [294-1] (mjr) (Entered: 08/19/1999)
		* * * * *
9/7/1999	330	STIPULATED ORDER by Chief Judge John E. Conway approving amendment No. 1 (attached herein) to agreement for deposit, investment and disbursement of monies paid to the Clerk of the Court pursuant to partial final judgments of the Court, as further described herein [321-1] (cc: all counsel) (ild) (Entered: 09/07/1999)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/20/99	335	ORDER by Judge C. LeRoy Hansen that notice be sent to class, as further described herein (cc: all counsel) (dmw) (Entered: 09/21/1999)
9/21/99	336	STIPULATED ORDER by Judge C. LeRoy Hansen regarding equitable relief, as further described herein (cc: all counsel) (dmw) (Entered: 09/21/1999)
		* * * * *
9/22/99	341	NOTICE of hearing before Judge C. LeRoy Hansen setting hearing on pltf's motion to amend the complaint [295-1] and Oglala Sioux's motion to intervene [294-1] at 9:00 am on 9/30/99 in Albuquerque, NM (Cimmarron Courtroom) (cc: all counsel, electronically) (ild) (Entered: 09/23/1999)
		* * * * *
9/23/99	342	NOTICE by defts of supplemental authority on pltf's motion to amend and Oglala Sioux'

DATE	DOCKET NUMBER	PROCEEDINGS
		motion to intervene (ild) (Entered: 09/23/1999)
		* * * * *
9/30/99	347	ORDER by Judge C. LeRoy Hansen granting pltf Ramah Navajo Chapter's motion to amend the complaint to add a claim for shortfalls of indirect costs as described herein [295-1] and granting Oglala Sioux's motion to intervene as a named party pltf [294-1]; defts shall respond to the modified complaint in intervention and the amended complaint within 30 days after service of the modified and amended complaint (cc: all counsel) (ild) (ln). (Entered: 09/30/1999)
		* * * * *
10/8/99	352	AMENDMENT by pltf Ramah Navajo Chapter to the first amended complaint by interlineation [14-1] (ild) (Entered: 10/13/1999)

DATE	DOCKET NUMBER	PROCEEDINGS
10/8/99	353	INTERVENOR'S CIVIL COMPLAINT by intervenor Oglala Sioux Tribe (ild) (Entered: 10/13/1999)
		* * * * *
11/1/99	358	ANSWER by defts Manuel Lujan, Eddie Brown, Marvin Pierce, and USA [353-1] (ild) (Entered: 11/02/1999)
11/1/99	357	ANSWER by defts Manuel Lujan, Eddie Brown, Marvin Pierce, and USA to pltf's amendments to first amended complaint by interlineation [14-1] (ild) (Entered: 11/02/1999)
		* * * * *
1/27/00	384	STIPULATED ORDER by Judge C. LeRoy Hansen granting pltf Oglala Sioux Tribe's Amended motion to amend its complaint in intervention [368-1] (cc: all counsel) (ild) (Entered: 01/30/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
1/27/00	390	AMENDMENT BY INTERLINEATION of Oglala Sioux Tribe's complaint in Intervention [353-1] (ild) (Entered: 02/16/2000)
		* * * * *
2/15/00	389	ANSWER by defts Manuel Lujan, Eddie Brown, Marvin Pierce, and USA to amendment by interlineation of Ogala Souix Tribe's complaint in intervention (Exhibit A to Doc. 368) [390-1] (ild) (Entered: 02/16/2000)
		* * * * *
2/23/00	397	MOTION by pltfs for partial summary judgment w/supporting exhibits/attachments (exhibits & attachments lodged in a 5-inch three ring binder) (ild) Modified on 02/24/2000 (Entered: 02/24/2000)
2/23/00	399	STIPULATED MOTION by pltfs to amend caption to record the fact that Oglala Sioux Tribe was granted intervention

DATE	DOCKET NUMBER	PROCEEDINGS
		(ild) Modified on 02/24/2000 (Entered: 02/24/2000)
		* * * * *
2/29/00	401	ORDER by Judge C. LeRoy Hansen granting pltfs' stipulated motion to amend caption to record the fact that Oglala Sioux Tribe was granted intervention [399-1]; the caption of this case is amended as further described herein (cc: all counsel) (ild) (Entered: 02/29/2000)
		* * * * *
7/7/00	447	MOTION by defts to stay briefing on pltfs' motion for partial summary judgment (pleading #397) (*) (ild) Modified on 07/07/2000 (Entered: 07/07/2000)
		* * * * *
7/18/00	456	ORDER by Chief Magistrate William Deaton granting defts' motion to stay briefing on pltfs' motion for partial summary judgment [447-1], [397-1] and directing defts to provide posi-

DATE	DOCKET NUMBER	PROCEEDINGS
		tion paper as further described herein (cc: all counsel)(ild) Modified on 07/18/2000 (Entered: 07/18/2000)
		* * * * *
8/1/00	462	STIPULATED ORDER by District Judge C. LeRoy Hansen for reentry to class and partial final jugment as to claim of Navajo Nation Tribe under Rule 54(b) as further described herein [181-1] (cc: all counsel) (ild) (Entered: 08/03/2000)
		* * * * *
8/29/00	466	AMENDED PARTIAL FINAL JUDGMENT by District Judge C. LeRoy Hansen as to claim of Siletz Tribe of Oregon under Rule 54(b) as further described herein [247-1] (cc: all counsel) (ild) (Entered: 08/29/2000)
9/1/00	467	STIPULATED AMENDED ORDER: by District Judge C. LeRoy Hansen for Reentry to Class and Partial Final Judgment as to claim of Navajo Na-

DATE	DOCKET NUMBER	PROCEEDINGS
		tion Tribe under 54(b) as further described herein [181-1], [462-1] (cc: all counsel) (ild) Modified on 09/05/2000 (Entered: 09/05/2000)
9/1/00	468	AMENDED PARTIAL FINAL JUDGMENT: by District Judge C. LeRoy Hansen as to Claim of White Mountain Tribe under Rule 54(b) as further described herein [250-1],e [242-1] (cc: all counsel) (ild) (Entered: 09/05/2000)
		* * * * *
10/5/00	475	STIPULATED ORDER regarding equitable relief by District Judge C. LeRoy Hansen as described herein (cc: all counsel) (jrm) (Entered: 10/05/2000)
		* * * * *
11/27/2000	487	AMENDED PARTIAL FINAL JUDGMENT: by District Judge C. LeRoy Hansen as to claim of Eastern Shoshone Tribe under Rule 54(b) as further described herein [198-1]

DATE	DOCKET NUMBER	PROCEEDINGS
		(cc: all counsel) (ild) (Entered: 11/27/2000)
		* * * * *
4/18/01	547	MOTION by pltf Ramah Navajo Chapter to amend the complaint by interlineation (mjr) (Entered: 04/18/2001)
4/18/01	548	MEMORANDUM by pltf Ramah Navajo Chapter in support of motion to amend the complaint by interlineation [547-1] (mjr) (Entered: 04/18/2001)
		* * * * *
8/8/01	570	AMENDED MOTION by Ramah Navajo Chapter and Oglala Sioux Tribe for partial summary judgment , or in the alternative, to strike defense (former employee) (Entered: 08/08/2001)
		* * * * *
8/16/01	575	STIPULATED ORDER by District Judge C. LeRoy Hansen as to briefing schedule re pltfs' amended motion for par-

DATE	DOCKET NUMBER	PROCEEDINGS
		tial summary judgment [570-1] or in the alternative to strike defense [570-2] as further described herein (cc: all counsel) (bap) (Entered: 08/16/2001)
		* * * * *
10/10/01	583	MEMORANDUM by Pueblo of Zuni in support of Ramah-Oglala class motion for partial summary judgment [570-1] or to strike defense [570-2] (dmw) (Entered: 10/11/2001)
		* * * * *
11/16/01	593	NOTICE by defts of statement of material facts not in dispute (bap) (Entered: 11/19/2001)
11/16/01	592	CROSS-MOTION by defendants for partial summary judgment (dmw) (Entered: 08/30/2006)
11/19/01	595	CROSS-MOTION by defts for partial summary judgment and RESPONSE (OPPOSITION) by defts to pltfs' amended motion for partial summary judgment or in the alternative [570-

DATE	DOCKET NUMBER	PROCEEDINGS
		1], to strike defense and opposition to Amicus Pueblo of Zuni's brief in support thereof [570-2] (bap) Modified on 11/20/2001 (Entered: 11/20/2001)
11/19/01	596	RESPONSE by defts to pltfs' statement of uncontested facts material [593-1] (bap) (Entered: 11/20/2001)
		* * * * *
12/17/01	600	RESPONSE by pltfs to motion for partial summary judgment [592-1] (mjr) (Entered: 12/17/2001)
12/17/01	601	REPLY by pltfs to response to motion for partial summary judgment [570-1] and ANSWER to defts' cross-motion for partial summary judgment [592-1] (mjr) (Entered: 12/17/2001)
12/17/01	602	RESPONSE by pltfs to defts' statement of material facts not in dispute [593- 1] (mjr) (Entered: 12/17/2001)

DATE	DOCKET NUMBER	PROCEEDINGS
12/17/01	602	REPLY by pltfs to defts' response to statement of uncontested facts [596-1] (mjr) (Entered: 12/17/2001)
		* * * * *
1/2/02	605	REPLY by defts to pltfs' answer to cross-motion for partial summary judgment [592-1] (bap) (Entered: 01/03/2002)
		* * * * *
3/25/02	630	UNOPPOSED MOTION and memorandum in support by intervenor Pueblo of Zuni to intervene (bap) (Entered: 03/26/2002)
		* * * * *
3/27/02	634	STIPULATED ORDER by District Judge C. LeRoy Hansen granting Ramah Navajo Chapter's motion to amend complaint to add new class claim [629-1], [629-2] and directing notice to the class (cc: all counsel) (bap) (Entered: 03/27/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
8/13/02	671	STAY ORDER by District Judge C. LeRoy Hansen staying cross-motions for partial summary judgment [592-1], [570-1] until Tenth Circuit's ruling in the Cherokee Nation case (cc: all counsel*) (bap) (Entered: 08/14/2002)
		* * * * *
9/9/02	678	JOINT MOTION by parties for preliminary and final approval of second partial settlement agreement and for order authorizing class notice (bap) (Entered: 09/09/2002)
9/9/02	679	ORDER by District Judge C. LeRoy Hansen granting parties' joint motion for preliminary and final approval of second partial settlement agreement and for order authorizing class notice dated 9/9/02 [678-1] and evidentiary approval hrg to consider final approval will be held 12/5/02 @ 10:00 am (cc: all counsel & Financial Deputy)

DATE	DOCKET NUMBER	PROCEEDINGS
		(bap) Modified on 09/10/2002 (Entered: 09/10/2002)
		* * * * *
9/23/02	686	STIPULATED ORDER by District Judge C. LeRoy Hansen re: establishing filing deadline for objections to second partial settlement agreement and for defts' response to pltfs' counsel fee application; approving parties' joint mtn for preliminary approval of second settlement agreement shall be 11/8/02 (cc: all counsel & Financial Deputy) (bap) (Entered: 09/24/2002)
		* * * * *
12/4/02	723	NOTICE by pltfs Ramah Navajo Chapter, Oglala Sioux Tribe, Pueblo of Zuni of filing pltfs' proposed findings of fact & conclusions of law approving 2nd partial settlement agreement & awarding atty's fees & costs & proposed order (td) (Entered: 12/04/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/5/02	732	CLERK'S MINUTES: before District Judge C. LeRoy Hansen re hrg on parties' joint motion for preliminary and final approval of second partial settlement agreement and order [678-1] C/R: Freda Donica (bap) (Entered: 12/06/2002)
		* * * * *
12/6/02	730	FINDINGS of fact and conclusions of law by District Judge C. LeRoy Hansen approving second partial settlement agreement, and awarding attorney's fees & costs as further described herein (cc: all counsel*) (bap) (Entered: 12/06/2002)
		* * * * *
12/6/02	731	JUDGMENT by District Judge C. LeRoy Hansen approving second partial settlement; USA shall pay pltfs $29,000,000 plus post-judgment interest and at

DATE	DOCKET NUMBER	PROCEEDINGS
		torney fees as further described herein (cc: all counsel*) (bap) (Entered: 12/09/2002)
		* * * * *
4/14/05	939	JOINT MOTION to lift stay and set briefing schedule (vv) (Entered: 04/14/2005)
		* * * * *
5/6/05	946	ORDER by Senior Judge James A. Parker granting joint motion to lift stay [939-1] (cc: all counsel) (vv) (Entered: 05/06/2005)
		* * * * *
7/20/05	962	SUPPLEMENT memorandum by pltfs re mtn for partial sum/jgm [570-1] (td) (Entered: 07/21/2005)
		* * * * *
9/6/05	970	SUPPLEMENTAL Memorandum by defendants in support of cross-motion for partial sum-

DATE	DOCKET NUMBER	PROCEEDINGS
		mary judgment [594-1] (*) (bap) (Entered: 09/06/2005)
9/6/05	971	APPENDIX (Exhibits) filed by defendants to supplemental memorandum in support of cross-motion for partial sum/jgm [970-1] (bap) (Entered: 09/06/2005)
		* * * * *
9/27/05	977	RESPONSE and Reply by pltf to defts' supplemental memorandum in support of cross-motion for partial sum/jgm and in support of pltfs' motion for sum/jgm [970-1] (*) (bap) (Entered: 09/28/2005)
		* * * * *
10/21/05	983	REPLY by defts to response to motion for partial summary judgment [594- 1] * (jrm) (Entered: 10/21/2005)
		* * * * *
10/25/05	985	JOINT NOTICE of briefing complete re: pltfs' mtn for partial sum/jgm [397-1] & defts'

DATE	DOCKET NUMBER	PROCEEDINGS
		cross mtn for partial sum/jgm [592-1] & joint request for oral argument (pz) (Entered: 10/26/2005)
		* * * * *
8/31/06	1042	MEMORANDUM, OPINION, AND ORDER: by Senior Judge C. LeRoy Hansen denying pltfs' amended motion for partial summary judgment [570- 1] to strike defense [570-2] and granting defts' cross motion for partial summary judgment [592-1] as further described herein (cc: all counsel*) (bap) (Entered: 08/31/2006)
		* * * * *
9/13/07	1095	STIPULATED ORDER by Senior Judge C. LeRoy Hansen granting parties' Joint 1094 Motion to Amend/Correct Scheduling Order of 6/14/2007 1080 and that pltfs have until 10/22/2007 in which to file either a motion to approve settlement agreement or a request for trial setting and that defts

DATE	DOCKET NUMBER	PROCEEDINGS
		have until 11/5/2007 in which to file a dispositive motion (bap) (Entered: 09/13/2007)
		* * * * *
1/17/08	1119	STIPULATED ORDER by Senior Judge C. LeRoy Hansen granting 1118 Motion to Amend/Correct Scheduling Order of 9/28/2007 1101 and giving plaintiffs until 2/29/2008 to file either a motion to approve settlement agreement, a dispositive motion, or request for trial setting and further ordering plaintiffs until 3/14/2008 to file their dispositive motion or response (bap) (Entered: 01/17/2008)
		* * * * *
3/19/08	1125	STIPULATED ORDER by Judge C. LeRoy Hansen granting 1122 Parties' Joint Motion to Amend the Scheduling Order of 1/17/08; parties shall have until 4/30/08 in which to file either a motion to approve settlement, dispositive motions, or

DATE	DOCKET NUMBER	PROCEEDINGS
		request for trial setting; a response to a dispositive motion, if any, by either party shall be filed by 5/15/08 (id) (Entered: 03/19/2008)
		* * * * *
4/24/08	1135	STIPULATED ORDER re 1119 Order on Motion to Amend, by Judge C. LeRoy Hansen. Motion to approve settlement, dispositive motions or a request for trial setting due by 5/20/2008. Response or dispositive motion if filed by either party by June 6, 2008. (ciy) (Entered: 04/24/2008)
		* * * * *
5/19/08	1138	Joint MOTION to Approve Settlement *Agreement (PSA-III) and for an Order that Notice be Sent to the Class* by Ramah Navajo Chapter. (Attachments: # 1 Third Partial Settlement Agreement Settling all Claims for Equitable Relief, # 2 Appendix A to the Third Partial Settlement Agreement, # 3

DATE	DOCKET NUMBER	PROCEEDINGS
		Exhibit Substituting for Exhibit 1 to Appendix A to the Third Partial Settlement Agreement, # 4 Exhibit Substituting for Exhibit 2 to Appendix A to the Third Partial Settlement Agreement, # 5 Appendix B to the Third Partial Settlement Agreement, # 6 Exhibit Substituting for Exhibits 1, 2 and 3 to Appendix B to the Third Partial Settlement Agreement, # 7 Appendix C (pages 1 to 20 of 45) to the Third Partial Settlement Agreement, # 8 Appendix C (pages 21 to 33 of 45) to the Third Partial Settlement Agreement, # 9 Appendix C (pages 34 to 45 of 45) to the Third Partial Settlement Agreement, # 10 Appendix D to the Third Partial Settlement Agreement, # 11 Appendix E to the Third Partial Settlement Agreement, # 12 Appendix F to the Third Partial Settlement Agreement, # 13 Appendix G to the Third Partial Settlement

DATE	DOCKET NUMBER	PROCEEDINGS
		Agreement)(Rogers, C.) (Entered: 05/19/2008)
		* * * * *
5/21/08	1140	ORDER by Senior District Judge C. LeRoy Hansen, Granting 1138 Joint Motion for Preliminary Approval of Third Partial Settlement Agreement and Directing Notice to the Class. Fairness Hearing set for 8/26/2008 10:00 AM in Albuquerque - 421 Gold Sixth Floor before District Judge C. LeRoy Hansen. (jmg) Modified text on 5/22/2008 (ciy). (Entered: 05/21/2008)
		* * * * *
8/26/08	1158	Clerk's Minutes for proceedings held before Senior District Judge C. LeRoy Hansen: Fairness Hearing held on 8/26/2008. (Court Reporter John DeLaRosa.) (jmg) (Entered: 08/27/2008)
8/27/08	1159	ORDER granting 1138 Joint MOTION to Approve Settlement *Agreement (PSA-III) by*

DATE	DOCKET NUMBER	PROCEEDINGS
		Senior District Judge C. LeRoy Hansen. (jmg) (Entered: 08/27/2008)
		* * * * *
8/27/08	1162	FINAL JUDGMENT in favor of Plaintiffs by District Judge C. LeRoy Hansen ; Dismissing this case with prejudice and as further described herein. (jrm) (Entered: 08/27/2008)
		* * * * *
10/24/08	1176	NOTICE OF APPEAL by Ramah Navajo Chapter. (Filing Fee - Online Payment) (Gross, Michael) (Entered: 10/24/2008)
		* * * * *
10/27/08	1177	Transmission of Preliminary Record for Notice of Appeal to US Court of Appeals re 1176 (pg) (Entered: 10/27/2008)
10/30/08	1178	USCA Case Number 08-2262 for 1176 Notice of Appeal filed by Ramah Navajo Chapter. (pg) (Entered: 10/30/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/14/08	1184	LETTER to USCA re briefing schedule for 1176 Notice of Appeal. (pg) (Entered: 11/14/2008)
		* * * * *
8/9/11	1217	MANDATE of USCA - the Judgment of the US District Court is reversed. The case is remanded to the US District court for further proceedings in accordance with the opinion of this court. 1176 (Attachments: # 1 opinion, # 2 judgment)(pg) cc: JG (Entered: 08/11/2011)
		* * * * *
9/26/11	1220	Clerk's Minutes for proceedings held before Chief Magistrate Judge Karen B. Molzen: Telephonic Status Conference held on 9/26/2011. Participants included Michael Gross, C. Bryant Rogers & Lloyd Miller on behalf of Plaintiff; and James Todd on behalf of Defendants. The Solicitor General

DATE	DOCKET NUMBER	PROCEEDINGS
		will decide this next month whether to seek certiorari. [THIS IS A TEXT-ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (tah) (Entered: 09/28/2011)
		* * * * *
10/21/11	1229	Application for an extension of time within which to file a petition for writ of certiorari has been presented to Justice Sotomayor, of which extended the time until November 14, 2011. 1176 (pg) (Entered: 10/25/2011)
		* * * * *
10/31/11	1235	PETITION FOR WRIT OF CERTIORARI filed in the Supreme Court of the United States on October 31, 2011 assigned No. 11-551. re 1176 (pg) (Entered: 01/11/2012)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
1/6/12	1236	**PETITION FOR WRIT OF CERTIORARI issued in the Supreme Court of the United States is granted. re 1176 Notice of Appeal (pg) (Entered: 01/11/2012)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 90-0957 SC

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

MANUEL LUJAN, SECRETARY OF THE INTERIOR; EDDIE BROWN, ASSISTANT SECRETARY OF THE INTERIOR; MARVIN PIERCE, CHIEF OF THE OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR; AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Jan. 2, 1991]

FIRST AMENDED COMPLAINT

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1. The Ramah Navajo Chapter is a subdivision and tribal organization of the Navajo Nation, a recognized Indian tribe, authorized and sanctioned to contract with the United States Government under The Indian-Self Determination And Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, as amended, P.L. 93-638.

2. Defendant Manuel Lujan is the Secretary of the Interior and is charged by law with the responsibility for implementing The Indian Self-Determination And Education Assistance Act, *supra*, and other laws intended to benefit Indians.

3. Defendant Eddie Brown is the Assistant Secretary of the Interior and is charged by law with the duty and responsibility of implementing The Indian Self-Determination And Education Assistance Act, *supra*, and other laws intended to benefit Indians and is the person in charge of the Bureau of Indian Affairs, U.S. Department of the Interior.

4. Defendant Marvin Pierce is the Chief of the Office of the Inspector General, U.S. Department of the Interior and is charged by law with the duty and responsibility of negotiating indirect cost rates with P.L. 93-638 tribal contractors.

Jurisdiction

5. The matter in controversy exceeds $10,000 exclusive of interest and costs. The controversy arises under one or more contracts by and between the United States Department of the Interior and the Ramah Navajo Chapter, each authorized by The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450, *et seq.*, as amended (Public Law 93-638). The Court has subject matter jurisdiction by reason of 25 U.S.C. §§ 450m-1; 28 U.S.C. § 1346; 5 U.S.C. §§ 701, *et seq.*; 28 U.S.C. § 1331; 28 U.S.C. § 1361; 41 U.S.C. § 609; 28 U.S.C. § 1343; and 28 U.S.C. §§ 2201 and 2202.

Facts

6. For several years the Ramah Navajo Chapter with authority of the Navajo Nation has exercised its self-determination rights under 25 U.S.C. §§ 450 *et seq.* to contract for programs formerly operated by the Bureau of Indian Affairs of the Department of the Interior. These contracts have encompassed and presently do

encompass real estate programs, natural resources, law enforcement, Aid to Tribal Government, water rights, juvenile services and crime prevention. In fiscal year 1989, the year in question, the direct federal funding base of these programs totalled $755,770. Total direct funding from all sources was $845,000.

7. The Indian Self-Determination Act, *supra*, mandates that the Secretary of the Interior enter into contracts for programs of this type whenever a qualified tribe or tribal organization applies for them and that he provide funding in an amount no less than he would have provided himself under his direct control of the program.

8. Apart from direct program funds, however, tribal self-determination contractors such as Plaintiff are entitled to additional compensation for indirect costs, also referred to as "contract support." These extra funds are intended to compensate tribal contractors for expenses non-governmental entities typically incur when they assume the responsibility of performing services previously performed directly by the federal government. These indirect costs include such things as insurance, legal fees, audits, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. For many self-determination contractors these additional costs can be and are significant. At Ramah, these costs have traditionally been 50% or more of the direct program base.

9. Under the framework established by the Bureau of Indian Affairs indirect costs are generally computed for each self-determination contractor by a negotiation

with the Interior Department's Inspector General (OIG). The negotiation produces a ratio of indirect cost pool costs to direct program revenues. In turn the ratio or percentage is then applied to the direct program base to produce the actual dollar amount of that contractor's indirect cost reimbursement for a given fiscal year.

10. Before passage of P.L. 100-472 on September 15, 1988, OIG followed a procedure borrowed from other federal agencies encompassed in a document known as OMB Circular A-87. Under it, tribal self-determination contractors were penalized if other federal or state agencies did not pay their fair share of indirect costs. A spiraling series of deficits resulted for many of these tribal contractors sending them into enormous debt either to their governing tribes or to the federal government itself. Along with correcting other problems, P.L. 100-472 was designed to correct this problem by mandating that P.L. 93-638 contractors get 100% of their need for indirect costs regardless whether other federal agencies or states pay their fair share.

Claim

11. In the case of Plaintiff, the fiscal year 1989 negotiation with OIG resulted in agreement as to the size of the indirect cost pool but disagreement as to the size and makeup of the direct cost base. Under the Plaintiff's proposal, the indirect cost rate would have been 51.5% and would have resulted in an indirect cost reimbursement of some $392,000.00. Under OIG's counterproposal, the indirect cost rate would have been 40% and resulted in an indirect cost reimbursement of $302,300.00. In point of fact, Ramah Navajo Chapter received approximately $324,000.00 in indirect cost re-

imbursements during fiscal year 1989 but is still owed approximately $68,000.00 which has not been paid.

12. The parties have failed to achieve a meeting of the minds as to the indirect cost rate for fiscal year 1989 and Plaintiff has exhausted its administrative remedies by having filed a contract dispute, which was denied August 27, 1990. The disagreement threatens to disrupt each successive year's negotiation.

13. The impasse over the fiscal year 1989 rate results from Defendants' insistence that certain State and other grants to the Ramah Navajo Chapter, which represent flow-through monies from other federal agencies, be taken into account by including them in the direct cost base, the denominator in the ratio producing the percentage called the indirect cost rate.

14. The Defendants' insistence on this procedure directly violates the express provisions of 25 U.S.C. §§ 450j-1(d) (1) and (2) and has damaged Plaintiff by depriving it of at least $50,000 badly needed for operation of its programs. This damage resulted from (a) decreasing the indirect cost percentage for fiscal year 1989 applied to the BIA program base, resulting in a smaller indirect cost recovery for BIA-contracted programs; and (b) failing to provide reimbursements mandated by Congress for indirect costs associated with other agencies' programs in the amount determined to be needed reflected in the indirect cost pool (the numerator), namely, the difference between what other agencies paid in indirect costs and the amount generated by the ratio of indirect cost pool divided by the direct program base.

15. Additionally, Ramah Navajo Chapter was not reimbursed its full entitlement to indirect costs in fiscal

year 1987 and is due the balance of that year's funding entitlement, which under Defendants' rules should have been added to the fiscal year 1989 recovery for indirect costs but was not so included. The amount so owed is approximately $26,000 and this issue was presented in the dispute denied August 27, 1990.

16. The Defendants have refused and continue to refuse to negotiate an indirect cost rate for fiscal year 1989 or any subsequent year without taking account of these state and federal flow through monies in the manner described above and refuse to reimburse the fiscal year 1987 shortfall. In addition, contrary to Congressional intent, Defendants refuse to acknowledge an obligation under the amendments to 25 U.S.C. §§ 450, *et seq.*, adopted in 1988 (Public Law 100-472) to fund the excess indirect costs needed to fully fund P.L. 93-638 contractors for operation of other federal programs which apply limits on the amount of indirect costs they will pay, or which refuse to pay any indirect costs at all, and a declaration of rights is needed to remedy this problem.

17. Defendants' refusal to implement § 450j-1(d) is inexcusable in view of that provision's express wording, which requires no implementing regulations, and directly violates Congress's intent.

Class Action

18. Plaintiff incorporates by reference paragraphs 1 through 16 as though set forth expressly.

19. There exists a class of tribes and tribal contractors who are persons contracting with the United States Department of the Interior under The Indian Self-Determination and Education Assistance Act, *supra*, and

whose contracts have been similarly denied their full indirect cost entitlements under applicable law. A significant portion of the Bureau of Indian Affairs' budget is contracted out under 25 U.S.C. §§ 450 *et seq.* An unknown but significant percentage (perhaps 100%) of the members of this class are experiencing shortfalls in reimbursement of indirect costs in the same manner as Plaintiff. The class is so numerous that joinder of all members is impractical.

20. There are common questions of law and fact which exist as to all members of the class. The applicability of A-87 to determination of indirect cost rates where tribal contractors also receive state grants is of particular concern and importance to the majority, if not all, Self-Determination Act contractors.

21. The claims of Plaintiff are the same or similar to the claims of the members of the class, who are located all over the United States. In particular, the representative party, Plaintiff, has been damaged in the same way or manner as the other members of the class, although the exact amounts of unreimbursed indirect costs to which each member of the class is entitled vary. In all likelihood, the Defendants' defense as to the representative party's claims would be the same; i.e., that A-87 continues to govern despite the wording of 25 U.S.C. § 450j-1(d).

22. The wholesale underfunding of indirect costs to authorized tribal self-determination contractors threatens to destroy the entire self-determination program, which has been the bedrock of Congressional Indian policy since 1975. The representative party's struggle to obtain its full entitlement each year for both program

and indirect costs has drained its administrative resources and undermined the quality of its programs, just as it has for the members of the class. The fact that many if not most members of the class do not have readily available funds to pay lawyers to litigate separate claims for each of them suggests that unless a class action is approved, many otherwise worthy self-determination claims will not be vindicated.

23. This Court should designate this action as a class action, since other inconsistent or varying adjudications with respect to individual members of the proposed class could establish incompatible standards of conduct for the parties opposing the class. Conceivably one court could find A-87 still governs indirect cost determinations while another finds that P.L. 100-472 is self-executing. Further, the common question of law or fact of the members of the class predominate over any questions affecting the individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. A single and final determination concerning the legality of taking state grants into account in fixing indirect cost rates under The Indian Self-Determination Act, *supra*, would eliminate countless hours of litigation, enormous expense, and the harm created by inconsistent decisions. It would hasten, if successful on the merits, full reimbursement of badly needed monies to Indian tribes and organizations around the country desperate to keep control of vital governmental programs as promised by Congress.

WHEREFORE, Plaintiff Ramah Navajo Chapter, on behalf of itself and the class it represents, prays for compensatory damages against Defendants in the

amount which is proven at trial for itself and the members of the class it represents; for a declaratory judgment that state grants not be allowed to adversely affect indirect cost rates of tribal contractors under P.L. 93-638; for an order directing that this action proceed as a class action; for an injunction directing development of procedures, as this Court may determine are necessary, to fully implement P.L. 100-472; for a declaratory judgment that Plaintiff Ramah Navajo Chapter's constitutional right to due process of law under the Fifth Amendment to the United States Constitution has been violated with regard to the Aid to Tribal Government program; for an order directing Defendants to pay Plaintiff the costs of this action and reasonable attorney's fees; and for such additional and further relief as the Court deems just and appropriate.

Respectfully submitted:

ROTH, VanAMBERG, GROSS,
ROGERS & ORTIZ
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By: /s/ MICHAEL P. GROSS
MICHAEL P. GROSS
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 90-0957 SC

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

MANUEL LUJAN, AS SECRETARY OF THE INTERIOR; EDDIE BROWN, AS ASSISTANT SECRETARY OF THE INTERIOR; MARVIN PIERCE, AS CHIEF OF THE OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR; AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Feb. 13, 1991]

ANSWER

COMES NOW Manuel Lujan, Secretary of the Interior, Eddie Brown, Assistant Secretary of the Interior, Marvin Pierce, Deputy Assistant Inspector General for audits (incorrectly referenced by plaintiff), U.S. Department of the Interior, and the United States of America (the defendants) and for their answer to the First Amended Complaint, state as follows:

1. The defendants admit the allegations of paragraph 1 of Plaintiff's complaint.

2. The defendants admit the allegations of paragraph 2 of Plaintiff's complaint.

3. The defendants admit the allegations of paragraph 3 of Plaintiff's complaint.

4. The defendants admit that Marvin Pierce is Deputy Assistant Inspector General for audits, but deny that he is Chief of the Office of the Inspector General for the U. S. Department of the Interior.

5. The defendants admit that jurisdiction exists for the plaintiff's claims stated in paragraphs 11-17 of the complaint, although not necessarily under all the bases asserted by the plaintiff, but deny that jurisdiction exists for the class action alleged by plaintiff in paragraph 5.

6. The defendants admit the allegations of the first two sentences of paragraph 6, but deny the allegations in the last two sentences of paragraph 6.

7. The defendants deny the allegations in paragraph 7 of the complaint.

8. The defendants admit the allegations of the first four sentences of paragraph 8 of plaintiff's complaint, but deny the last sentence of paragraph 8 of the complaint.

9. The defendants admit the allegations of the first sentence of paragraph 9 of plaintiff's complaint but deny the remaining allegations of that paragraph.

10. The defendants deny the allegations of paragraph 10 of the plaintiff's complaint.

11. The defendants admit the allegations of the first sentence of paragraph 11 of plaintiff's complaint, but deny the remainder of the paragraph.

12. The defendants admit the allegations of paragraph 12 of plaintiff's complaint.

13. The defendants deny the allegations of paragraph 13 of plaintiff's complaint.

14. The defendants deny the allegations of paragraph 14 of plaintiff's complaint.

15. The defendants deny the allegations of paragraph 15 of plaintiff's complaint.

16. The defendants deny the allegations of paragraph 16 of plaintiff's complaint.

17. The defendants deny the allegations of paragraph 17 of plaintiff's complaint.

18. The defendants incorporate by reference their answers to paragraphs 1 through 16 of plaintiff's complaint in response to the allegations of paragraph 18 of plaintiff's complaint.

19. The defendants deny the allegations of paragraph 19 of plaintiff's complaint.

20. The defendants deny the allegations of paragraph 20 of plaintiff's complaint.

21. The defendants deny the allegations of paragraph 21 of plaintiff's complaint.

22. The defendants deny the allegations of paragraph 22 of plaintiff's complaint.

23. The defendants deny the allegations of paragraph 23 of plaintiff's complaint.

24. The defendants respectfully request that the plaintiffs be denied all relief requested in the complaint and further relief as the court may seem proper.

AFFIRMATIVE DEFENSES

1. The defendants' determinations are reasonable and are not arbitrary, capricious or contrary to law.

2. Sufficient common questions of fact on law do not exist and a class action would not be proper, since other tribes of the class have not exhausted administrative remedies and have differing contractual provisions and factual claims.

3. Plaintiff lacks standing to bring this action on behalf of the class and is not representative of the class since other tribes have not exhausted their administrative remedies; a jurisdictional prerequisite to suit.

4. The other class members have adequate remedies available to them and are able to personally prosecute actions on their own behalf.

5. The class action claim is not ripe.

Respectfully submitted,

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United States Attorney

/s/ JOHN W. ZAVITZ
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 90-0957 LH/RWM

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

MANUEL LUJAN, SECRETARY OF THE INTERIOR; EDDIE BROWN, ASSISTANT SECRETARY OF THE INTERIOR; MARVIN PIERCE, CHIEF OF THE OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR; AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Oct. 1, 1993]

MEMORANDUM OPINION

THIS MATTER came on for consideration of Plaintiff's Motion to Certify Class Under Rule 23, filed on August 21, 1991 (Docket No. 31). Plaintiff seeks to certify as a class all Indian tribes and organizations contracting under the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450) (the "Act") with the Bureau of Indian Affairs ("BIA"), who receive or are entitled to receive contract support funding based on indirect cost rates negotiated through the office of the inspector general. Having reviewed the position of the parties and the applicable law, the Court concludes that the motion is well taken and shall be granted.

Plaintiff claims that the BIA has failed to provide statutorily mandated indirect costs to Plaintiff in an amount set forth in Section 450-j-1 of the Act.

Defendants resist the motion for class certification. Defendants' principal objection is that although Plaintiff has exhausted its administrative remedies and is therefore properly before this Court, the claims of Plaintiff as representative party are not typical of the proposed class members. Specifically, Defendants argue that there is no showing that the members of the class to be certified have exhausted their administrative remedies under the Act. Defendants contend that unless the administrative remedies have been exhausted by each of the members of that class that they may not be included in the class. The theory is that the exhaustion of administrative remedies is jurisdictional and that if the remedies have not been exhausted, the court's action regarding the class would be without jurisdiction.

The Indian Self-Determination Act provides that the United States District Court shall have concurrent jurisdiction with the United States Court of Claims over any civil action or claims against the BIA for money damages arising out of self-determination contracts authorized by the Act. The Act also provides that the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, shall apply to disputes concerning self-determination contracts. The claims being brought by Plaintiff relate to a self-determination contract with the BIA, and it is clear that the Contract Disputes Act applies to this case. Thus, decisions relating to the Contract Disputes Act are instructive in determining whether the exhaustion of remedies under that statute is a jurisdictional prerequisite to an action in this court.

A review of the decisions of the Court of Claims or its successor, the United States Claims Court, and appeals therefrom, make clear that when a government contractor wishes to seek relief in connection with the performance of his contract, he must first submit a claim to the agency contracting officer and receive an opinion from that official. The completion of these steps is a jurisdictional prerequisite to the filing of a complaint relative to the claim in the Court of Claims. *Thoen v. United States*, 768 F.2d 1110 (Fed. Cir. 1985); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336 (Fed. Cir. 1983).

Plaintiff contends, however, that even if exhaustion of administrative remedies is a jurisdictional prerequisite, certification may still be granted if it would be futile for the potential class members to complete those jurisdictional prerequisites. The Court notes that Plaintiff has not cited, nor could it locate, any cases decided under the Contract Disputes Act where exhaustion of remedies was waived as having been futile. This is not dispositive, however.

In *Association for Community Living in Colorado v. Romer*, 992 F.2d 1040 (10th Cir. 1993), a case decided under the Individuals with Disabilities Education Act ("IDEA"), the Tenth Circuit Court of Appeals concluded that a claimant under the IDEA need not exhaust its remedies if exhaustion would be futile or would fail to provide adequate relief, or where and agency has adopted a policy or pursued a practice of general applicability that is contrary to the law. *Id.*, 992 F.2d 1040, 1044.

"Administrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek systemwide reforms." *Id.*

The *Romer* case, along with the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988) are instructive. The Court notes that Plaintiff's action does not concern a typical contract dispute wherein issues of performance need be addressed. If that were the case, the purposes behind exhaustion of administrative remedies would require that the contract claim first be brought to the attention of an agency contracting officer.[1] Instead, [REDACTED]. In such a case as this, exhaustion of administrative remedies is not required.

In light of the above, it is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act. [REDACTED]

["Received" Stamp REDACTED]

An order in accordance with this memorandum opinion shall be entered.

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[1] In *Romer*, the Court noted that exhaustion of administrative remedies under the IDEA serves the following important purposes: "(1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress; and (4) avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any error." *Romer*, 992 F.2d 1040, 1044 (*quoting Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 812 (10th Cir. 1989) (decided under the Education of the Handicapped Act).

/s/ LEROY HANSEN
LEROY HANSEN
UNITED STATES DISTRICT
JUDGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 90-0957 LH/RWM

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

MANUEL LUJAN, SECRETARY OF THE INTERIOR; EDDIE BROWN, ASSISTANT SECRETARY OF THE INTERIOR; MARVIN PIERCE, CHIEF OF THE OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR; AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Oct. 1, 1993]

ORDER

THIS MATTER came on for consideration of Plaintiff's Motion to Certify Class Under Rule 23, filed on August 21, 1991 (Docket No. 31). The Court having reviewed the memoranda of the parties and having issued its memorandum opinion of even date, FINDS:

That Plaintiff's motion is well taken and will be granted.

[REDACTED]

IT IS FURTHER ORDERED that the plaintiff class shall include those Indian tribes and organizations who

have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

/s/ LEROY HANSEN
LEROY HANSEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 90-0957 LH/WWD

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR; KEVIN GOVER, ASSISTANT SECRETARY OF THE INDIAN AFFAIRS; ROBERT J. WILLIAMS, ACTING INSPECTOR GENERAL; U.S. DEPARTMENT OF THE INTERIOR; AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Sept. 30, 1999]

STIPULATED ORDER ALLOWING INTERVENTION AND AMENDMENT OF THE AMENDED COMPLAINT

This matter came before the Court on the stipulation of the parties, and the Court being apprised in the premises, **IT IS ORDERED, ADJUDGED AND DECREED** THAT

The motion of the named Plaintiff Ramah Navajo Chapter to amend the amended complaint to add a claim for shortfalls of indirect costs from the commencement of Fiscal Year 1994 forward, the so-called "second tier claim" for that period is GRANTED.

The motion of the Oglala Sioux Tribe to intervene as a named party Plaintiff to serve with the Ramah Navajo Chapter representing the Class as to the "second tier claim" for that period is also GRANTED with the proviso that the Movant Oglala Sioux Tribe's motion, insofar as it states a claim or claims for "second tier shortfalls" for Fiscal Years prior to FY 1994, is WITHDRAWN but may be filed again WITHOUT PREJUDICE within six (6) months of the entry of this order and any defense based on laches, limitations, or similar affirmative defense which may otherwise be available to the Defendants on these claims shall be tolled as to the period from the date the motion to intervene was originally filed until the date of timely refiling. Defendants have agreed to provide information regarding indirect cost shortfalls and payment to the Class for FY 1992 and FY 1993 in an informal manner so as to expedite the parties' assessment of the factual basis for Movants' original pleadings as to the "second tier claims" for those years. Nothing in this order shall, however, prevent or bar any party from taking formal discovery under the Federal Rules of Civil Procedure.

Plaintiff Ramah Navajo Chapter shall modify the proposed Amendment to First Amended Complaint by Interlineation to change FY 1992 to FY 1994 in Paragraph 28. Oglala Sioux Tribe shall modify its proposed Civil Complaint in Intervention to change FY 1992 to FY 1994 in Paragraphs 11 and 15 and delete Paragraph 17. Any other defense to the modified Complaint in Intervention and the Amended Complaint that Defendants may wish to assert is not limited or waived in any manner by their consent to this Stipulated Order.

Defendants are directed to answer or otherwise respond to the modified Complaint in Intervention and the Amended Complaint within thirty (30) days after service of the modified Complaint in Intervention and the Amended Complaint.

/s/ LEROY HANSEN
LEROY HANSEN
United States District Judge

Submitted:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 900957 LH/WWD

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

BRUCE BABBIT, SECRETARY OF THE INTERIOR; KEVIN GOVER, ASSISTANT SECRETARY OF INDIAN AFFAIRS; ROBERT J. WILLIAMS, ACTING INSPECTOR GENERAL; U.S. DEPARTMENT OF THE INTERIOR; AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Oct. 8, 1999]

AMENDMENT TO FIRST AMENDED COMPLAINT BY INTERLINEATION
(Approved For Filing By Order Of the Court Entered Sept. 30, 1999)

CLAIM FOR UNDERPAYMENT OF INDIRECT COSTS FOR ALLEGED INSUFFICIENCY OF APPROPRIATIONS

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26. Paragraphs 1 through 25 are incorporated by reference as though fully restated herein.

27. Starting in FY 1994, in Pub. L. 103-138, and continuing in each successive fiscal year since then (Pub. L. 103-332, Pub. L. 104-134, Pub. L. 104-208, Pub. L. 105-83, and Pub. L. 105-277), Congress inserted the phrase

"not to exceed" in front of a specific dollar amount for contract support under Indian Self-Determination Act (ISDA) contracts or compacts.

28. In each fiscal year since FY 1994, the amount which defendants contend was available from each annual appropriation has been below the level of need acknowledged by the Bureau of Indian Affairs to reimburse each ISDA contractor's or compactors need for indirect costs (IDC).

29. Shortfalls in payments of IDC to the Class caused by this alleged insufficiency of appropriations are different from but also encompasses the underpayment of IDC to the Class caused by under-calculation of IDC rates as pled and litigated to this point. See 112 F.3d 1455 (10th Cir. 1997).

30. At all material times, the Bureau of Indian Affairs has published and sent a notice to each contractor and compactor late in the federal fiscal year, and therefore late in the contract year for most contractors including the named Plaintiff, stating a level of "need" below 100% which each of them would receive.

31. The Plaintiff and the Class have a statutory right to negotiate an indirect cost rate for determination of the contractor's indirect costs requirements for that period or a lump sum for contract support in lieu of an indirect cost rate. This method has been followed by the vast majority of P.L. 93-638 contractors and compactors.

32. ISDA requires the Secretary to add the full amount of contract support to each contractor's contract or annual funding agreement under 25 U. S. C. §§ 450j-1 (a)(2)and (3), (g) and 450*l*, ¶c(2).

33. At all material times, the Secretary has stated that the lack of sufficient appropriations has extinguished his legal liability and that of the United States to pay 100% of the indirect costs acknowledged as needed by Plaintiff and the Class it represents.

34. In the Omnibus Consolidated and Emergency Supplemental Appropriations Act for FY 1999, Pub. L. 105-277, 112 Stat. 2618 (Oct. 21, 1998), Congress inserted in Section 314 a provision which the Secretary has interpreted as a further basis for extinguishing any legal liability to pay indirect costs in excess of the "not to exceed" language inserted since FY 1994.

35. The Secretary's stated position as to his legal liability or that of the United States to pay more than the "not to exceed" level of contract support during material times conflicts with the position and interests of the named Plaintiff and each Class member and a declaration of the rights and obligations of the parties is required.

36. The United States owes to Plaintiff and the members of the Class the difference between the contract amount for contract support set by each contractor's or compactor's contract or annual funding agreement for each fiscal year since the beginning of 1994 and the level of reimbursements received.

37. The Plaintiffs have exhausted their administrative remedies under 41 U.S.C. § 605.

WHEREFORE, Plaintiffs pray for judgment for money damages for breach of contract in such amount as may be shown at trial; for a declaratory judgment establishing the Plaintiff's and Class's right to payment of

100% of need for contract support; for prejudgment and post-judgment interest as allowed by 41 U.S.C. § 611; and for such other and further relief as the Court deems just and meet.

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By: /s/ MICHAEL P. GROSS
MICHAEL P. GROSS
Plaintiff's Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 90-0957 LH/WWD-ACE

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

BRUCE BABBIT, SECRETARY OF THE INTERIOR; KEVIN GOVER, ASSISTANT SECRETARY OF INDIAN AFFAIRS; ROBERT J. WILLIAMS, ACTING INSPECTOR GENERAL; U.S. DEPARTMENT OF THE INTERIOR; AND THE UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Oct. 8, 1999]

OGLALA SIOUX TRIBE'S
CIVIL COMPLAINT IN INTERVENTION
(Approved For Filing By Order Entered Sept. 30, 1999)

Introduction

1. This is a claim for money damages for breach of a series of Indian Self-Determination contracts between a recognized Indian tribe, the Oglala Sioux Tribe (referred to as Plaintiff or Plaintiff-in-Intervention), and the Defendants, agencies or agents of the United States Government, under 25 U.S.C. §§ 450 *et seq.*, as amended. Plaintiff claims that Defendants failed to pay additional required amount of indirect costs (also known as con-

tract support) under 25 U.S.C. § 450j-l(a) and (b) as required by its contracts and by applicable law over and above the amounts claimed in the First Amended Complaint and to seeks to intervene for the purpose of expanding that original claim to encompass all class-wide shortfalls. As a member of the class, the Plaintiff-in-Intervention thus seeks the same damages for the miscalculation of its annual indirect cost rate and recovery based on the original cause of action as pursued by the named Plaintiff to date. However, in this Complaint in Intervention Plaintiff in Intervention seeks additional damages for shortfalls caused by the Defendants' assertion that they did not have sufficient funds from annual appropriations to cover 100% of the "need" recognized by them. Both the remaining portion of the original claim pursued by the named Plaintiff Ramah Navajo Chapter and the claim presented in this Complaint in Intervention turn on the Defendants' legal liability to pay 100% of contract support needed to operate ISDA contracts in the face of claims by Defendants of insufficiency of appropriations. For easy reference, the new claim will be called the "second-tier claim" or the "insufficiency" claim.

Jurisdiction

2. This case arises under The Indian Self-Determination And Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, as amended ("ISDA"). The amount in controversy exceeds $100,000. The Court has subject matter jurisdiction under 25 U.S.C. § 450m-1(a); 28 U.S.C. § 1346; 28 U.S.C. § 1331; 28 U.S.C. § 1361; 41 U.S.C. § 609; 28 U.S.C. § 1343; 28 U.S.C. §§ 2201 and 2202.

Parties

3. Plaintiff is a federally-recognized Indian tribe which is the beneficial owner and occupant of a federal Indian reservation known as the Pine Ridge Reservation in southwestern South Dakota.

4. Defendant Bruce Babbitt is the Secretary of the Interior and is charged by law with the duty of implementing the ISDA and other laws intended to benefit Indians.

5. Defendant Kevin Gover is the Assistant Secretary of the Interior for Indian Affairs and is also charged by law with the duty of implementing ISDA and other laws intended to benefit Indians.

6. Defendant Robert J. Williams is the Inspector General of the Interior Department and is charged by law with the duty to negotiate indirect cost rates under ISDA contracts including those with Plaintiff.

7. Defendants are each sued in their official capacities.

Claim

8. At all relevant times Congress has appropriated sufficient funds to pay Plaintiff 100% of the indirect costs to which it is entitled by virtue of its negotiated indirect cost rate for each fiscal period.

9. In the alternative, any failure of Congress to appropriate 100% of the funds needed to pay for indirect costs (also known as contract support) does not extinguish the legal liability of the United States to pay 100% of the negotiated indirect costs of Indian Self-

Determination Act (ISDA) to contractors including Plaintiff in Intervention.

10. At all relevant times Plaintiff has performed its contracts under ISDA satisfactorily and is therefore entitled to full recovery of the sums negotiated for both direct and indirect costs on its contracts under ISDA. At all relevant times, Plaintiff relied reasonably and to its detriment on the contract amounts including contract support (indirect costs) in its yearly agreements with Defendants.

11. In breach of Plaintiff's contracts, Defendants have failed to pay Plaintiff its full indirect costs pursuant to its annual indirect cost rates and agreements and at the times specified in its various ISDA contracts. Instead, during FY 1994 and ever since then, the BIA has sent notices to Plaintiff and all other ISDA contractors that there are not enough funds to pay 100% of the indirect costs agreed to by the BIA, and has paid only stated percentages of admitted need as determined by its negotiated indirect cost rates to Plaintiff in Intervention and other ISDA contractors.

12. These shortfalls have damaged Plaintiff and Plaintiff is entitled to monetary relief in the form of contract damages plus interest under the Contract Disputes Act, 41 U.S.C. § 611 as incorporated into ISDA, 25 U.S.C. § 450m-1.

13. Plaintiff filed a series of contract disputes with the Contracting Officer as required by the Contract Disputes Act, 41 U.S.C. § 605(a).

14. The Contracting Officer failed to respond to either dispute within the required time and the disputes

are therefore deemed denied. 61 Federal Register No. 122, page 32533,25 C.F.R §§ 900.223 and 900.224. Plaintiff has thus exhausted its administrative remedies.

15. Plaintiff claims damages for FY 1994 forward including any future shortfalls as part of this action.

16. There exists a class of tribes and tribal contractors who are persons contracting with the United States Department of the Interior under The Indian Self-etermination and Education Assistance Act, *supra*, and who have similarly been denied their full indirect cost entitlements under applicable law and contracts. The Court certified the Class on October 1, 1993. A significant portion of the Bureau of Indian Affairs' budget is contracted out under 25 U.S.C. §§ 450 *et seq*. The members of this class are experiencing shortfalls in reimbursement of indirect costs in the same manner and for the same reasons as Plaintiff. The class is so numerous that joinder of all members is impractical. The claim presented here relates to the claim and transactions contained in the Class's original cause of action.

WHEREFORE, Plaintiff in Intervention Oglala Sioux Tribe, on behalf of itself and the class it represents, prays for compensatory damages against Defendants in the amount which is proven at trial for itself and the members of the class it represents; for an order directing Defendants to pay Plaintiff the costs of this action and reasonable attorney's fees; and for such additional and further relief as the Court deems just and appropriate.

Respectfully Submitted,

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By: /s/ MICHAEL P. GROSS
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Plaintiff's Counsel

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 90-0957 LH/WWD-ACE

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

BRUCE BABBIT, ET AL., DEFENDANTS

[Filed: Nov. 1, 1999]

ANSWER TO AMENDMENTS TO FIRST AMENDED COMPLAINT BY INTERLINEATION

The Defendants, by and through their undersigned counsel, answer the numbered allegations of the Plaintiff's Amendments to First Amended Complaint by Interlineation as follows:

26. Defendant incorporates the answers to paragraphs 1-23 contained in its Answer filed February 13, 1991, and the deemed answers to paragraphs 24 and 25 contained in the Court's Order filed November 6, 1991, in response to the allegations of Paragraph 26. In addition, Defendants affirmatively assert that the claims stated in paragraphs 24 and 25 are barred by the Final Judgment filed October 18, 1994, in this action.

27. Defendants admit paragraph 27.

28. Deny paragraph 28 as a characterization and aver that in each fiscal year since 1994, Congress placed a legal limit on the amount of funds the Secretary could use to pay contract support costs.

29. Paragraph 29 contains legal conclusions to which no answer is required.

30. Defendants deny paragraph 30 and aver that the BIA provided notice to tribes as to the distribution of contract support costs in each relevant fiscal year.

31. The first sentence in paragraph 31 contains a legal conclusions to which no answer is required. As to the second sentence, the vast majority of contractors do not negotiate lump sum contract support costs agreements.

32. Defendants deny paragraph 32.

33. Defendants deny paragraph 33 as a characterization and aver that the lack of appropriations eliminates the Secretary's legal obligation to pay amounts beyond what is appropriated.

34. Defendants deny paragraph 34 and aver that the Secretary interprets section 114 as confirming the statutory caps enacted in fiscal years 1994 though 1999 which placed legal limits on the amount of funds the Secretary could use for contract support costs and confirms that the Secretary had and has no legal obligation to pay more then what was appropriated to pay contract support costs under the Indian Self-Determination and Education Assistance Act,

35. Defendants deny paragraphs 35.

36. Defendants deny paragraph 36.

37. Defendants have insufficient knowledge and facts to admit or deny paragraph 37 as it relates to fiscal years 1996 and beyond, and therefor deny the same on that basis.

38. Deny the last paragraph which is unnumbered and constitutes the prayer and demand.

AFFIRMATIVE DEFENSE

Plaintiff has failed to exhaust its administrative procedures and remedies as required by 25 U.S.C. § 450m-1(d) for fiscal years 1997 and beyond.

WHEREFORE, Plaintiff should be denied all relief requested and this action should be dismissed.

Respectfully submitted:

JOHN J. KELLY
United States Attorney

JOHN W. ZAVITZ
Assistant U.S. Attorney
P.O. Box 607
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(505) 224-1505

I HEREBY CERTIFY that a true copy
of the foregoing pleading was mailed
to opposing counsel of record,
this 1st day of Nov., 1999.

_____

John W. Zavitz
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 90-0957 LH/WWD ACE

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

BRUCE BABBIT, ET AL., DEFENDANTS

Filed: Nov. 1, 1999

ANSWER TO OGLALA SOUIX TRIBE'S CIVIL COMPLAINT IN INTERVENTION

The Defendants, by and through their undersigned counsel, answer the numbered allegations of the Oglala Souix Tribe's Civil Complaint in Intervention as follows:

1. Paragraph 1 is an introduction to which no answer is required.

2. Defendants admit paragraph 2.

3. Defendants admit paragraph 3.

4. Defendants admit paragraph 4.

5. Defendants admit paragraph 5.

6. Defendants deny paragraph 6 and aver that Earl E. Devaney is the Inspector General of the Interior Department.

7. Defendants admit paragraph 7.

8. Defendants deny paragraph 8.

9. Defendants deny paragraph 9.

10. Defendants have insufficient knowledge and facts to admit or deny paragraph 10, and therefore deny the same on that basis.

11. Defendants deny paragraph 11.

12. Defendants deny paragraph 12.

13. Defendants deny paragraph 13 and aver that Plaintiff filed one contract dispute covering fiscal years 1992 through 1996 with the contracting officer under the Contract Disputes

Act, 41 U.S.C. § 605(a).

14. Defendants admit paragraph 14 to the extent that the contracting officer did not respond to Plaintiff s contract dispute claim for fiscal years 1992 through 1996 and are therefore deemed denied.

15. Paragraph 15 is a prayer for relief to which no answer is required.

16. Defendants have insufficient knowledge and facts to admit or deny paragraph 16, and therefor deny the same on that basis, except to admit that the Court certified the Class on October 1, 1993.

AFFIRMATIVE DEFENSE

Plaintiff has failed to exhaust its administrative procedures and remedies as required by 25 U.S.C. § 450m-1(d) for fiscal years 1996 and beyond.

WHEREFORE, Plaintiff should be denied all relief requested and this action should be dismissed.

Respectfully submitted:

JOHN J. KELLY
United States Attorney

JOHN W. ZAVITZ
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 224-1505

I HEREBY CERTIFY that a true copy
of the foregoing pleading was mailed
to opposing counsel of record,
this 1st day of Nov., 1999.

_____
John W. Zavitz
Assistant U.S. Attorney

2000

ANNUAL FUNDING AGREEMENT

Attachment on Contract No. CTM75T72208

BY AND BETWEEN

THE RAMAH NAVAJO CHAPTER

AND THE

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

For the period

Jan. 01, 2000 through Dec. 31, 2000

Pursuant To
25 U.S.C. 450 et. Seq.
(PL 93-638 As Amended)

Sec. 1(a) IN GENERAL—This Annual Funding Agreement, referred to in this agreement as the "AFA", is incorporated into the Indian Self-Determination Agreement, referred to in this agreement as the "Contract", first executed by the Ramah Navajo Chapter, referred to in this agreement as the "Contractor", and the Secretary of the Interior, referred to in this agreement as the "Secretary", by contract modification dated January 01, 2000.

(b) **PURPOSE**—Pursuant to Sec. 1(f)(2) of the Contract, this AFA shall contain:

(1) terms that identify the programs, services, functions, and activities to be performed or administered,

(2) the general budget category assigned,

(3) the funds to be provided,

(4) the time and method of payment,

(5) a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), and

(6) such other provisions to which the parties agree.

(c) **PROGRAMS, SERVICES, FUNCTIONS, AND ACTIVITIES**—

(1) The programs, services, functions, and activities to be performed or administered

pursuant to Sec. 1(a)(2) of the Contract are identified as follows:

(A) Consolidated Tribal Government Program include:

- Department of Trust Services:
  Real Estate Services Program
  including: Lease Compliance & Probate Services
  Natural Resource Services Program
  including: Agricultural Extension Program
- Department of Public Safety
  Law Enforcement and Detention Services
  Criminal Investigations Program
- Department of Community Resources:
  Aid to Tribal Government Program
  including: Tribal Court/Peacemaking/Mediation Program

(B) Facilities Operation/Maintenance Program including: Direct Rental/Quarters Improvement & Repairs and

(C) Woodlands

(D) Water Rights Protection/Zuni River Basin

(E) 2% ISTEA Funds/Planning

(F) Law Enforcement Special Pooled

(G) Reserved

(H) Indirect Contract Support Costs

(2) A brief description of the programs, services, functions, and activities to be performed or administered pursuant to Sec. 1(a)(2) of the Contract are as follows:

(A) **CONSOLIDATED TRIBAL GOVERNMENT PROGRAM**

- **DEPARTMENT OF TRUST SERVICES**

Natural Resources to provide management of restricted and trust land within Ramah Navajo Reservation. The Realty functions are associated with Land Acquisition and Disposal, Surface and Subsurface Leasing and Permitting, Rights-of-way, Trespasses, Litigations, Contractual Compliance, and Records Management. The Real Estate Services will provide trust protection to Indian people of the Ramah Navajo reservation through real property management. Provide services to Ramah Navajo Agricultural producers in planning, range improvement, soil and water conservation for optimum use of available resources that supports a sustainable livelihood and assist the Department of Community Resources with economic development ventures utilizing agricultural methodologies. Program services will be provided in Farmland Improve-

ment, Rangeland Improvement, Leasing and Permitting Services and Resources Enforcement Services.

- **DEPARTMENT OF PUBLIC SAFETY**

Provide Law Enforcement and Detention program services by providing security on the Ramah Navajo Indian reservation through effective Crime Prevention and Law Enforcement activities and ensure Detention Facilities are maintained. The scope of work includes federal Criminal Investigations as authorized by the U.S. Attorney. Law Enforcement program services include includes traffic enforcement and preventive patrol, Domestic Violence Prevention Program, D.U.I. checks and respond to Child molestation and Abuse and crime prevention.

- **DEPARTMENT OF COMMUNITY RESOURCES**

The Department of Community Resources will provide support services to the Ramah Navajo Chapter Government to help improve governmental processes and to assist in delivery of services to the Ramah Navajo community. The program will assist in the areas of planning for community and economic development, planning for land use, environmental related issues, community emergency management, inventory, re-

search and unclassified work for other. The program will provide oversight to the Family Mediator Program (Tribal Court), the Water Rights activities.

(B) **FACILITIES OPERATION/ MAINTENANCE PROGRAM/ QUARTERS IMPROVEMENT/ REPAIR LAND LEASE**
(If funds are available)

Provide janitorial and maintenance services to the Bureau-owned facilities at the Ramah Navajo Agency and those facilities that house the P.L. 93-638 programs operated by the Ramah Navajo Chapter. Facilities Management services include Operations and Maintenance, Preventive (Scheduled) Maintenance, Janitorial Service and Unscheduled Maintenance. Services include management and supervision of the Facilities Operation, maintenance of utilities, fire and safety, security, custodial services, maintenance of buildings and two BIA Quarters, grounds, repair and replacement of tools and equipment associated with the Facilities program.

(C) **WOODLANDS**
(If funds are available)

The woodland project is for purposes of conservation of woodland in the community through coordination of services between the Chapter and the BIA-Ramah Navajo Agency Branch of Forestry.

(D) **WATER RIGHTS PROTECTION/ZUNI RIVER BASIN**
(If funds are available)

Ramah Navajo Chapter will gather information and data to develop a stand in support of negotiating water claims settlement. Administration oversight will be provided as well as responsibility for coordinating the effort toward reaching a final settlement of claims in the *State of New Mexico vs. Kerr McGee, et al.* and the *City of Gallup vs. United States of America. et al.* Any development of a plan for watershed protection, rehabilitations and management will be coordinated with water claims settlement, such as the two suits mentioned above. The primary goal of the Ramah Navajo Chapter is to protect its water rights interests so that its people's way of life is continued and to protect its future growth plans to accommodate its future population growth and economic development. To achieve the settlement of the above mentioned suits, the Chapter will organize and formulate an inventory of technical data and historical resource data and to have the Chapter participate in the negotiation process to attain final settlements.

(E) **2% ISTEA FUNDS/PLANNING**
(If funds are available)

The scope of work as contained in the proposal submitted in FY 99 will be followed. The deliverables as indicated in that scope of work will be completed by the Ramah Navajo Chapter.

(F) **LAW ENFORCEMENT SPECIAL POOLED**
(If funds available)
(Includes Criminal Investigator)

Provide 24-hour law enforcement and detention services on the Ramah Navajo Indian Reservation. Continue operations through effective crime prevention and community oriented police services. Ensure that secure detention facilities are maintained. The scop of work includes the investigation of all federal crimes pursuant to an agreement with US Attorney. Law Enforcement activities include investigation of misdemeanor crimes, traffic enforcement, preventive patrols, sobriety checkpoint and saturation patrols, response to domestic violence calls and participation in a Domestic Violence Prevention program. Provide youth oriented services such as a Police Explorer Program and a Gang Resistance Education and Training (GREAT) program.

(G) **RESERVED**—Direct Contract Support Services—Costs for activities which must be carried on by the Contractor to ensure compliance with the terms of the Contract and prudent management in accordance with Sec. 106 (a)(2) and (3) of the Act but which were not provided for in the funding available for the direct operation of the above programs.

(H) **Indirect Contract Support Costs**—Costs for activities which must be carried on by the Contractor to ensure compliance with the terms of the Contract and prudent management in accordance with Sec. 106(a)(2) and (3) of the Act but were not provided for in the funding available above.

(3) PROGRAMS RETAINED—The Secretary hereby retains the programs, services, functions, and activities with respect to the Ramah Navajo Chapter, that are not specifically assumed by the Contractor in this AFA. These include but are not limited to:

(A) RAMAH NAVAJO AGENCY TRIBAL SHARES FOR SUPPORT OF PROGRAMS OPERATED BY THE RAMAH NAVAJO CHAPTER.

(B) ALBUQUERQUE AREA OFFICE TRIBAL SHARES FOR SUPPORT OF PROGRAMS OPERATED BY THE RAMAH NAVAJO CHAPTER.

(C) BIA CENTRAL OFFICE TRIBAL SHARES FOR SUPPORT OF PROGRAMS OPERATED BY THE RAMAH NAVAJO CHAPTER.

(4) FUTURE NEGOTIATIONS—The Contractor retains the right to negotiate with the Secretary under the provisions of the Indian Self Determination and Educational Assistance Act, as amended, to include such retained programs, services, functions, and activities in the current and/or future AFA's, including the inclusion of Agency, Area, BIA Central Office "Tribal Shares" once they are identified.

(5) REPRESENTATION—The Contractor may be present or represented at any and all Ramah Navajo Agency Council meetings, other standing committees of the Agency, and other like boards or committee meetings. The Superintendent of the Ramah Navajo Agency will inform the Contractor in writing of such meetings in advance and provide the Contractor with the agenda.

(d) FUNDING AND BUDGETS—

(1) The amounts available under the Contract are summarized using FY 99 funding levels as follows:

PROGRAM/ACTIVITY	Tentative FY 2000 Funding
(A) Consolidated Tribal Government Programs	
Department of Trust Services	$ 365,037.00
Department of Community Resources	$ 306,919.00
Department of Public Safety	$ 490,540.00

(TPA Programs-CTGP) Sub-Total:	**$**	**1,162,496.00**
(B) Facilities Operation/ Maintenance Program	$	$ 93,578.00
Direct Rental		$ 2,356.00
Quarters Improvement & Repair	$	20,000.00
Lease Compliance	$	1,000.00
(C) Woodlands	$	*
(D) Water Rights Protection/ Zuni River Basin	$	*
(E) 2% ISTEA Fund/Planning	$	*
(F) Law Enforcement Special Pooled/Criminal Investigator	$	79,000.00
(G) RESERVED	$	0.00
(CTGP + non-TPA) Sub-Total:	**$**	**1,358,430.00**

NOTE: * represents tentative budget for recurring, non-recurring

(H) Indirect Costs, 86.4% of direct base	$	1,173,684.00
(Tentative IDC rate only)		
TOTAL FY 2000 FUNDS AVAILABLE:	**$**	**2,532,114.00**

Indirect Cost rate for Calendar Year 1999 and 2000 have not been completed yet with the Office of Inspector General. As of the date of submittal of this AFA, neither has the Chapter completed its Calendar Year 2000 Indirect Cost proposal. The last approved IDC rate was for CY 1998 at 86.4%. Based on

this last approved rate, Ramah Navajo Chapter requests that the CY 1998 IDC negotiated final rate be used to temporarily fund IDC at 100% level. NOTE*: (Funding of the amount shall be subject to the availability of appropriation. The funding for the above programs with an asterisk has not been appropriated as of the signing of this AFA.) As soon as funding has been appropriated and sub-allotted to the Ramah Navajo Agency, funds will be added to the AFA.

(i) Direct Contract Support Costs are to be negotiated within the first ninety, (90) days of the new contract term and shall be funded from the BIA's Indian Self-Determination Fund as soon as resources can be made available, but not later than September 30, 2000. The Contractor reserves the right to annually renegotiate its need for Direct Contract Support Costs in accordance with Sec. 106(a)(3)(B) of the Act. Funding of the amount needed shall be subject to the availability of appropriations.

(ii) Outstanding Indirect Cost issues from past fiscal years which Ramah Navajo Chapter has not received will be subject to continuing discussion until resolved.

(2) **BUDGET**—Detailed budget reflecting the amounts identified under Sec. 1(d)(1) above may, at the option of the Contractor, be attached to this AFA as Attachment "A" subject to the following provisions:

(A) The Contractor retains the right to re-budget to meet contract objectives pursuant to Sec.

106(o) of the Indian Self-Determination and Education Assistance Act.

(3) **FUNDING AND PAYMENTS**—Funding under this AFA shall be provided to the Contractor in a Lump-Sum pursuant to Sec. 1(B)(6)(B) of the Contract. Additional funding identified for the Contractor after the award of the Contract and this AFA shall be modified into the AFA within 10 days of when the funding has been received by the Albuquerque Area Office.

(A) Payments to the Contractor are generally due on the first day of the AFA, except that in FY 2000 such lump sums shall be due and paid three (3) business days after a modification, incorporating this AFA has been accepted and signed by the Contractor and Awarding Official, and added to the DOI's, "P-638" Payment System by January 01, 2000. Additional funds identified pursuant to modifications under the AFA shall be made available within 10 days of when the funds are made available to the Albuquerque Area Office. Payments will be made available to the Contractor through the Secretary's P-638 payment system.

(B) Funding for additional contract support costs shall be added to the AFA for the Contractor which includes Indian Self-Determination Fund direct and indirect type costs. The amount of Indirect Cost Funding shall be based upon the Contractor's Indirect Cost Agreement which is applicable to this period of performance.

(C) Ramah Navajo Chapter will not be limited or reduced in any way the services, contracts, or funds that any other Indian Tribe or tribal organization is eligible to receive. This will include equal access to non-recurring funds such as Woodlands, Facilities Maintenance & Repair and any other funding that becomes available.

(e) **OTHER PROVISIONS—**

(1) NO REDUCTION IN PROGRAMS, SERVICES TO OTHER TRIBES—Pursuant to Sec. 105(I)(2) of the Act, nothing in the AFA diminishes any programs, services, or functions to other Tribes.

(2) NO DUPLICATION OF COSTS—Since some but not all funds provided under this AFA represent Direct and Indirect Contract Support Costs, the Contractor certifies that no duplication of funding exists under this AFA between Sec. 106(a)(1) and Sec. 106(a)(2) and (a)(3) funding.

(3) MODIFICATION OF THIS AFA—All modifications to this AFA and the model Contract shall be executed in accordance with Sec. 1(e)(2) of the Contract.

(4) APPROVING OFFICIAL—The Superintendent of the Ramah Navajo Agency of the Ramah Navajo Agency shall be the Approving Official.

(5) AWARDING OFFICIAL—Any person who by appointment or delegation in accordance with applicable regulations has the authority to enter into and administer contracts on behalf of the

United States of America and make determinations and findings with respects thereto. Pursuant to the Act, this person can by any Federal Official, including but not limited to Contracting Officers.

(6) CONTINUING RESOLUTIONS—In the event the Federal Government is operating under a Continuing Resolution and is not able to fully fund this AFA in the amount specified at Sec. 1(D)(1) of this AFA, the Government shall make available to the contractor the full amount of funds authorized under the then current Continuing Resolution within ten, (10) days of when the funds are made available to the Secretary.

(f) SIGNATURES—This Contract and its Attachments constitute the full and complete agreement between the parties.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
PINE RIDGE AGENCY
P.O. Box 1203
PINE RIDGE, SOUTH DAKOTA 57770

Memorandum [MAY 22 2001]

To: President, Oglala Sioux Tribe

From: Awarding Official

Subject: Distribution of Contract

Attached is the duplicate original contract document for your files.

CONTRACT NO.	CONTRACTOR	AMOUNT	FOR
CTA06T34478	OGLALA SIOUX TRIBE P.O. Box H Pine Ridge, SD 57770	AWARD $128,649.00	ENROLLMENT PROGRAM CY-01

/s/ [ILLEGIBLE]
Awarding Official

cc: Contracts Office - Oglala Sioux Tribe
Financial Accounting Office - Oglala Sioux Tribe (638)
Director - OST Enrollment Program
AORT, A06
Contracting Section, Pine Ridge Agency

* * * * *

SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE OGLALA SIOUX TRIBAL GOVERNMENT.

(a) AUTHORITY AND PURPOSE.

(1) AUTHORITY.—This agreement, denotes a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of the Interior (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to Title I of the Indian Self-Determination and Education Assistance Act, as amended (25 U.S.C. 450 et seq,) and by the authority of the Oglala Sioux Tribal Government (referred to in this agreement as the "Contractor"). The provisions of title I of the Indian Self-Determination and Education Assistance Act, as amended (25 U.S.C. 450 et seq.) are incorporated in this agreement.

(2) PURPOSE.—Each provision of the Indian Self-Determination and Education Assistance Act, as amended (25 U.S.C. 450 et seq.) and each provision of this contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under Section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: The OST Enrollment Program.

(b) TERMS, PROVISIONS, AND CONDITIONS.—

(1) TERM.—Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1)), the term of this contract meets The definition of a Mature contract, pursuant to Section 105(d)(1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

(2) EFFECTIVE DATE.—This contract shall become effective on the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

(3) PROGRAM STANDARD.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the contract in conformity with the Scope of Work. The Contractor and the Secretary agree to further amend this contract to revise and re-describe the program standards. The amendments shall occur following meetings between the Tribal Program Director, Tribal Contracting and Agency Contracting staff. This will afford the Contractor the opportunity to generate quality standards. The Oglala Sioux Tribe's

Record-keeping System Manual, Financial Management Manual and Purchasing & Property Management Manual are hereby incorporated into this contract by reference. Revisions to the Contractor's Management Systems shall be made available to the Pine Ridge Agency Awarding Official.

(4) FUNDING AMOUNT.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

(5) LIMITATION OF COSTS.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this contract or a specific activity conducted under this contract would be greater than the amount of funds awarded under this contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this contract, the Contractor may suspend perfor-

mance of the contract until such time as additional funds are awarded.

(6) PAYMENT.—

(A) IN GENERAL.—Payments to the Contractor under this contract shall—

(i) be made as expeditiously as practicable; and

(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

(B) QUARTERLY, SEMIANNUAL, LUMP-SUM AND OTHER METHODS OF PAYMENT.—

(i) IN GENERAL.—Pursuant to section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by the contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or a semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by

the Contractor and specified in the annual funding agreement.

(ii) METHOD OF QUARTERLY PAYMENT.—If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the contract year coincides with the Federal fiscal year, payment for the first quarter shall be made no later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this contract.

(iii) APPLICABILITY.—Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this contract and the annual funding agreement referred to in clause (i).

(7) RECORDS AND MONITORING.—

(A) IN GENERAL.—Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record-keeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be

considered Federal records for purposes of chapter 5 of title 5, United States Code.

(B) RECORDKEEPING SYSTEM.—The Contractor shall maintain a recordkeeping system and, upon reasonable advance request, provide reasonable access to such records to the Secretary.

(C) RESPONSIBILITIES OF CONTRACTOR.—The Contractor shall be responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this contract to ensure compliance with the contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visits shall be limited to not more than one performance monitoring visit for this contract by the head of each operating division, departmental bureau, or departmental agency, or duly authorized representative of such head unless—

(i) the contractor agrees to one or more additional visits; or

(ii) the appropriate official determines that there is reasonable cause to believe that grounds for reassumption of the contract, suspension of contract payments, or other serious contract performance deficiency may exist. No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem

that requires the additional visit has been given to the Contractor.

(8) PROPERTY.—

(A) IN GENERAL—As provided in section 105(f) of the Indian Self-Determintion and Education Assistance Act (25 U.S.C. 450j(f)), at the request of the Contractor, the Secretary may make available, or transfer to the Contractor, all reasonable divisible real property, facilities, equipment, and personal property that the Secretary has used to provide or administer the programs, services, functions, and activities covered by this contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor, and periodically revised by the Secretary, with the concurrence of the Contractor.

(B) RECORDS.—The Contractor shall maintain a record of all property referred to in subparagraph (A) or other property acquired by the Contractor under section 105(f)(2)(A) of such Act for purposes of replacement.

(C) JOINT USE AGREEMENTS.—Upon the request of the Contractor, the Secretary and the Contractor shall enter into a separate joint use agreement to address the shared use by the parties of real or personal property that is not reasonably divisible.

(D) ACQUISITION OF PROPERTY.—The Contractor is granted the authority to acquire such excess property as the Contractor may determine to be appropriate in the judgement of the Contractor to support the programs, services, functions, and activities operated pursuant to this contract.

(E) CONFISCATED OR EXCESS PROPERTY.—The Secretary shall assist the Contractor in obtaining such confiscated or excess property as may become available to tribes, tribal organizations, or local governments.

(F) SCREENER IDENTIFICATION CARD.—A screener identification card (General Services Administration form numbered 2946) shall be issued to the Contractor not later than the effective date of this contract. The designated official shall, upon request, assist the Contractor in securing the use of the card.

(G) CAPITAL EQUIPMENT.—The Contractor shall determine the capital equipment, leases, rentals, property, or services the Contractor requires to perform the obligations of the Contractor under this subsection, and shall acquire and maintain records of such capital equipment, property rentals, leases, property, or services through applicable procurement procedures of the Contractor.

(9) AVAILABILITY OF FUNDS.—Notwithstanding any other provision of law, any funds provided under this contract—

(A) shall remain available until expended; and

(B) with respect to such funds, no further—

(i) approval by the Secretary, or

(ii) justifying documentation from the Contractor, shall be required prior to the expenditure of such funds.

(10) TRANSPORTATION.—Beginning on the effective date of this contract, the Secretary shall authorize the Contractor to obtain interagency motor pool vehicles and related services for performance of any activities carried out under this contract.

(11) FEDERAL PROGRAM GUIDELINES, MANUALS, OR POLICY DIRECTIVES.—Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

(12) DISPUTES.—

(A) THIRD-PARTY MEDIATION DEFINED.—For the purposes of this contract, the term "third party mediation" means a form of mediation whereby the Secretary and the Contractor nominate a third party who is not employed by or significantly involved with the Secretary of

the Interior, the Secretary of Health and Human Services, or the Contractor, to serve as a third-party mediator to mediate disputes under this contract.

(B) ALTERNATIVE PROCEDURES.—In addition to, or as an alternative to remedies and procedures prescribed in section 110 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450m-1), the parties to this contract may jointly—

(i) submit disputes under this contract to third-party mediation;

(ii) submit the dispute to the adjudicator body of the Contractor, including the tribal court of the Contractor;

(iii) submit the dispute to mediation processes provided under the laws, policies, or procedures of the Contractor, or

(iv) use the administrative dispute resolution processes authorized in sub-chapter IV of Chapter 5 of title 5, United States Code.

(C) EFFECT OF DECISIONS.—The Secretary shall be bound by decisions made pursuant to the processes set forth in subparagraph (B), except that the Secretary shall not be bound by any decision that significantly conflicts with the interests of Indians or the United States.

(13) ADMINISTRATIVE PROCEDURES OF CONTRACTOR.—Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.), the

laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

(14) SUCCESSOR ANNUAL FUNDING AGREEMENT.—

(A) IN GENERAL.—Negotiations for a successor annual funding agreement, provided for in subsection (f)(2), shall begin no later than 120 days prior to the conclusion of the preceding annual funding agreement. Except as provided in section 105(c)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(2)) the funding for each such successor annual funding agreement shall only be reduced pursuant to section 106(b) of such Act (25 U.S.C. 450j-1(b)).

(B) INFORMATION.—The Secretary shall prepare and supply relevant information, and promptly comply with any request by the Contractor for information that the Contractor reasonably needs to determine the amount of funds that may be available for a successor annual funding agreement, as provided for in subsection (f)(2) of this contract.

(15) CONTRACT REQUIREMENTS; APPROVAL BY SECRETARY.—

(A) IN GENERAL.—Except as provided in subparagraph (B), for the term of the Contract,

section 2103 of the Revised Statutes (25 U.S.C. 81) and section 16 of the Act of June 18, 1934 (58 Stat. 987, chapter 576; 25 U.S.C. 476), shall not apply to any contract entered into in connection with this contract.

(B) REQUIREMENTS.—Each contract entered into by the Contractor with a third party in connection with performing the obligations of the Contractor under this contract shall—

(i) be in writing,
(ii) identify the interested parties, the authorities of such parties, and purposes of the contract.
(iii) state the work to be performed under the contract; and
(iv) state the process for making any claim, the payments to be made, and . the terms of the contract, which shall be fixed.

(c) OBLIGATION OF THE CONTRACTOR—

(1) CONTRACT PERFORMANCE.—Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this contract.

(2) AMOUNT OF FUNDS.—The total amount of funds to be paid under this contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between

the Secretary and the Contractor, which shall be incorporated into this contract.

(3) CONTRACTED PROGRAMS.—Subject to the availability of appropriated funds, the contractor shall administer the programs, services, functions, and activities identified in this contract and funded through the annual funding agreement under subsection (f)(2).

(4) TRUST SERVICES TO INDIVIDUAL INDIANS.—

(A) IN GENERAL.—To the extent that the annual funding agreement provides funding for the delivery of trust services to individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary provided for such individual Indians, subject to the availability of appropriated funds for such services.

(B) TRUST SERVICES TO INDIVIDUAL INDIANS.—For the purposes of this paragraph only, the term "trust services for individual Indians" means only those services that pertain to land or financial management connected to individually held allotments.

(5) FAIR AND UNIFORM SERVICES.—The Contractor shall provide services under this contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and greivances brought by program beneficiaries against the

Contractor arising out of the performance of the contract.

(d) OBLIGATION OF THE UNITED STATES.—

(1) TRUST RESPONSIBILITY.—

(A) IN GENERAL.—The United States reaffirms the trust responsibility of the United States to the Oglala Sioux Indian Tribe to protect and conserve the trust resources of the Indian Tribe(s) and the trust resources of individual Indians.

(B) CONSTRUCTION OF CONTRACT.—Nothing in this contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

(2) GOOD FAITH.—To the extent that health programs are included in this contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

(3) PROGRAMS RETAINED.—As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the Tribe that are not specifically assumed by the Contractor in the annual funding agreement under subsection (f)(2).

(e) OTHER PROVISIONS.—

(1) DESIGNATED OFFICIALS.—Not later than the effective date of this contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the contract, and other purposes for this contract.

(2) CONTRACT MODIFICATIONS OR AMENDMENTS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), no modification to this contract shall take effect unless such modification is made in the form of a written amendment to the contract, and the Contractor and the Secretary provide written consent for the modification.

(B) EXCEPTION.—The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2), shall not be subject to subparagraph A.

(3) OFFICIALS NOT TO BENEFIT.—No Member of Congress, or resident commissioner, shall be permitted to any share or part of any contract executed pursuant to the contract, or any benefit that may arise from such contract. This paragraph may not be construed to apply

to any contract with a third party entered into under this contract if such contract is made with a corporation for the general benefit of the corporation.

(4) COVENANT AGAINST CONTINGENT FEES.—The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

(f) ATTACHMENTS.—

(1) APPROVAL OF CONTRACT.—Unless previously furnished to the Secretary, the resolution of the Oglala Sioux Indian Tribe authorizing the contracting of the program, services, functions, and activities identified in this contract is attached to this contract as attachment 1.

(2) ANNUAL FUNDING AGREEMENT.—

(A) IN GENERAL.—The annual funding agreement under this contract shall only contain—

(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment.

(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

(B) INCORPORATION BY REFERENCE.—The annual funding agreement is hereby incorporated in its entirety in this contract and attached to this contract as Attachment 2.

ATTACHMENT 2

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ABERDEEN AREA OFFICE
PINE RIDGE AGENCY

PUBLIC LAW 93-638, AS AMENDED

ANNUAL FUNDING AGREEMENT

WITH THE

OGLALA SIOUX TRIBE

CONTRACT NO. CTA06T34478

* * * * *

Section B
Program and Budget

Sec. 1. Program(s). The Contractor shall perform that portion of the Bureau of Indian Affairs' Enrollment Program described herein in accordance with the terms, provisions, and conditions of this contract.

Sec. 2. Contract Budget. The budget for the services provided under this contract reflects the agreements reached during contract negotiations. The contract budget includes both direct and indirect costs. Budget Category Assigned:

Accounting and Appropriation Data	Change From	+ or -	Change To
CY-01 FUNDING:			
* 001-A-06344-0102-39220-252i	$ -	$ 99,190.00	$ 99,190.00
* 002-A06344-0102-39270-252i	$ -	$ 29,459.00	$ 29,459.00
Subtotal:	$ -	$ 128,649.00	$ 128,649.00
TOTAL AMOUNT OF CONTRACT:			
* Admin./Budget: Add/Obligate CY-01 funding as shown above	$ -	$ 128,649.00	$ 128,649.00

1. The Contractor shall request prior approval for budget revisions whenever:

   (a) The budget revision results from changes in the scope or objective of the program;
   (b) The revision requires additional funding;
   (c) The revision causes a change in the amount of indirect cost for the contract; or,
   (d) The revision pertains to the addition of items requiring approval of the Bureau of Indian Affairs.

2. All other budget revisions do not require approval.

3. Incurrence of Cost: Contractor is authorized to be reimbursed for any reasonable, allowable and allocable costs incurred for the operation of the program(s) under this contract from January 1,2001 to the date of award of this contract.

Sec. 3. Contract Amount. Amount of Funding to be provided by the Bureau of Indian Affairs under this Agreement for Fiscal Year 2001 is as reflected in the SF-26 Award and/or SF-30 Modification/Contract document.

1. Funds to be provided: See Sec. 4.

2. Other Provisions:

   (a) Other financial resources (Other than those provided by the Secretary) to which the parties agree.

(b) Negotiations for a successor annual funding agreement shall be in accordance with Section 1(b)(15) of this contract.

Sec. 4. Contract Support Funds. Contract Support Funds shall be provided by the Bureau of Indian Affairs, subject to the availability of funding, in accordance with the Indirect Cost Negotiation Agreement between the Contractor and the Office of the Inspector General, and in accordance with Bureau of Indian Affairs policies and procedures pertaining to the distribution of Contract Support Funds. Add Indirect Cost funds in the amount of $29,459.00 to reflect a 75% level of the FY-00 proposed rate of 39.6%. The balance of funds will be added as soon as it becomes available subject to congressional appropriation.

SECTION C
Statement of Work

Sec. 1. Scope of Bureau Program(s) to be Performed.

1. Purpose. To state the terms conditions, and work to be performed under the contract and the rights and responsibilities of each of the parties, to enable the Contractor to acquire and utilize all resources made available by the Bureau of Indian Affairs (BIA) for the delivery of services and programs specified herein, pursuant to the Pub. L. 93-638, as amended, and other applicable Federal laws.

   (a) The Contractor shall obtain from the BIA all such funds and other resources made available for the benefit of the tribe for all programs to be operated and services to be delivered by the Contractor through this contract on behalf of the BIA, except for "Trust" and "executive functions" of the BIA which are considered non-contractible.

   (b) The BIA shall transfer to the Contractor all such funds and other resources made available for the benefit of the Tribe through this contract in the most expeditious manner authorized by law, and shall provide technical support and assistance at the request of the Contractor and as provided herein.

   (c) The Contractor shall exercise full discretion over the funds made available sub-

ject only to the provisions of this contract and Federal law.

Sec. 2. SCOPE OF WORK: The Contractor shall provide all necessary personnel and services; to acquire supplies, materials, major and sensitive equipment and property, automated data processing equipment (ADPE), motor vehicles such as passenger and light trucks, special purpose motor vehicles through the negotiated or competitive open market using the above described management manuals and procedures which have been incorporated into this contract.

The Contractor may also use the General Services Administration (GSA) acquisition systems or procedures, or may request waivers in order to acquire or purchase any of the above items as stated herein and such other functions as may be required and identified during the term of this contract and program in order to accomplish the intended mission and tasks as outlined under the clauses that follow.

* * * * *

SECTION E
Administration Data

Sec. 1. Awarding Official's Technical Representative.

1. Mr. Robert D. Ecoffey, Superintendent, is designated as the Awarding Official's Technical Representative for this contract.

2. Ms. Frieda Iron Cloud, Branch Chief, Realty is designated as the Subordinate Awarding Official's Technical Representative for this contract.

Sec. 2. Contract Payment. For performing this contract, the Contractor shall be reimbursed for its allowable direct and indirect costs, not to exceed the total budgeted amount of the contract. The total budget amount of this contract is stated in item l5F of the SF-26, Award/Contract (October 1983) or, if amended, as stated in item 14 of the SF-30, Amendment of Solicitation/ Modification of Contract (October 1983).

Payment System: Contract payments shall be made to the Contractor through the Bureau of Indian Affairs P-638 Automated Clearing House (ACH) Payment System.

Advance Payment: Notwithstanding any other provision of law, Contract payments shall be made in advance on a quarterly, semi-annual, or lump sum basis. Each quarterly payment shall be made on the first day of each quarter of each fiscal year, the first semi-annual payment shall be made on the first day of the first quarter of the contract year, the final semi-annual payment

shall be made on the first day of the third quarter of the contract year, the lump sum payment shall be made on the first day of the first quarter of the contract year, except that in any case in which the contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is ten (10) calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this contract.

Check one of the following:

( ) Quarterly Payments.
( ) Semi-Annual Payments.
(X) Lump Sum Payments.
( ) Other Payment Methods.

3. Use of Funds Advanced: Funds advanced to the Contractor shall be used only for purposes authorized under this contract. The funds advanced cannot be used for any purpose other than an authorized Bureau program expenditure, even on a temporary basis. Further, funds advanced pending disbursement for a purpose authorized under this contract shall not be transferred to tribal accounts, lent to such tribal accounts, or expended for programs or purposes not specifically authorized under this contract. Funds advanced, pending expenditure under this contract, shall be placed in appropriate savings, checking; or investment accounts. Such funds when invested or deposited shall be subject to the following:

(a) Invested only in obligations of the United States, or in obligations or securities that are guaranteed or insured by the United States, or mutual (or other) funds registered with the Securities and Exchange Commission and which only invest in obligations of the United States or securities that are guaranteed by the United States; or,

(b) Deposited only into accounts that are insured by an agency or instrumentality of the United States, or are fully collateralized to ensure protection of the funds, even in the event of a bank failure.

4. Sanctions: Failure to maintain the integrity of contract funds shall result in imposition of one or more of the following sanctions:

(a) Pursuant to Section 5(d) of Public Law 93-638, as amended (25 USC 450c(d)), funds paid to the Contractor and not used for the purposes for which they were paid shall be repaid to the Treasury of the United States; and,

(b) Cancellation of Advance Payment methodology and invocation of "other payment methodologies" as provided in provision 2, above.

(c) Sanctions shall remain in place until the Contractor provides assurance that the impropriety which resulted in the impo-

sition of sanctions has been rectified and will not reoccur.

Sec. 3. Submission of Invoices. The Contractor shall use the S.F. 269A - Financial Status Report and Attachment 1 as its invoice document. The Contractor shall submit such invoice to the Awarding Official's Technical Representative on a quarterly basis in accordance with the schedule established for submission of the quarterly Financial Status Reports.

1. At any time or times prior to final payment under this contract, the Awarding Official may cause to be made, such audit of the invoices or vouchers and statements of costs as shall be deemed necessary. Each payment made before that time shall be subject to reduction to the extent that amounts included in the related invoice or vouchers and statement of cost are found by the Awarding Official not to constitute allowable cost, and shall also be subject to reduction for overpayment or to increase for underpayment on preceding invoices or vouchers.

2. On receipt and approval of the voucher or invoice designated by the Contractor as the "final voucher" or "final invoice" and statement of costs, which shall be submitted by the Contractor as promptly as may be practicable following completion of the work under this contract, but no later than ninety (90) days or such longer period as the Awarding Official may in his discretion, approve in

writing from the date of such completion, and following compliance by the Contractor with all provisions of this contract; the Government shall, as promptly as may be practicable, pay to the Contractor any balance of allowable cost.

3. Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract; notwithstanding any provisions contained elsewhere in this contract or other documents incorporated in this contract by reference, designating services to be performed or materials to be furnished by the Contractor at its expense or without cost to the Government.

Sec. 4. Contract Revision or Amendment.

1. This contract may be revised or amended as required to carry out the purpose of the program, project or function being contracted. The Contractor shall submit proposed revisions through the Awarding Official's Technical Representative to the Awarding Official. The Contractor (if other than the tribal governing body) shall also send copies of the proposed revision to the designated representative of the tribal governing body at the same time as they are sent to the Awarding Official. The Awarding Official shall review

the proposed revision in accordance with 25 CFR, Chapter V, Part 900, Subpart E.

2. When the Awarding Official recommends declination of a Contractor's request to amend the contract, the matter shall be resolved as prescribed in P.L. 93-638, as amended.

Sec. 5 Negotiated Indirect Cost Rates.

1. The allowable indirect costs under this contract shall be obtained by applying negotiated indirect cost rates to bases agreed upon by the parties, as specified below.

2. Negotiation of indirect cost rates by the Contractor and the cognizant audit agency shall be undertaken as promptly as practicable after receipt of the Contractor's indirect cost proposal.

3. Allowability of cost and acceptability of cost allocation methods shall be determined in accordance with OMB Circular A-87.

4. The results of each negotiation shall be set forth in an Indirect Cost Negotiation Agreement, such agreement shall become a part of this contract by reference. The agreement shall specify:

   (a) The agreed indirect cost rate(s);
   (b) The base to which the rate(s) apply;
   (c) The periods for which the rate(s) apply; and,

(d) The specific items treated as exclusions or any changes in the items previously agreed to be treated as exclusions.

5. The Contractor is to be reimbursed for all allocable and allowable indirect costs incurred in performance of this contract, subject to any statutory limitations applicable.

6. Any failure by the parties to agree on any indirect cost rate(s) or applicability of the rate(s) to the bases under this provision shall be considered a dispute concerning a question of fact for decision by the Awarding Official within the meaning of the clause of this contract entitled "Disputes".

Sec. 6. Billings for Indirect Cost. The contractor shall bill for Indirect Cost earned on his voucher\ invoice showing the following, for the period covered by the voucher\invoice:

1. Total direct cost expenditures.

2. Less Exclusions.

3. Times Indirect Cost Rate.

4. Times percentage of rate funded by BIA.

5. Indirect Cost earned for the period covered. (1)- (2) X (3) X (4) = (5).

Sec. 7. Disputes.

1. This contract is subject to the Contract Disputes Act of 1978 (41 USC 601-613)(the Act).

2. Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

3. "Claim", as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $50,000 is not a claim under the Act until certified as required by subparagraph 4(b), below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

4. (a) A claim by the Contractor shall be made in writing and submitted to the Awarding Official for a written decision. A claim by the Government against the Contract shall be subject to a written decision by the Awarding Official.

(b) For Contractor claims exceeding $50,000, the Contractor shall submit with the claim a certification that:

(1) The claim is made in good faith;

(2) Supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and,

(3) The amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.

(c) (1) If the Contractor is an individual, the certification shall be executed by that individual.

(2) If the Contractor is not an individual, the certification shall be executed by:

(i) A senior company official in charge at the Contractor's plant or location involved; or

(ii) An officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

5. For Contractor claims of $50,000 or less, the Awarding Official must, if requested in writing by the Contractor, render a decision within 60 days of the request for Contractor-certified claims over $50,000, the Awarding Official must, within 60 days, decide the

claim or notify the Contractor of the date by which the decision will be made.

6. The Awarding Official's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

7. The Government shall pay interest on the amount found due and unpaid from (a) the date the Awarding Official receives the claim (properly certified if required), or (b) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Awarding Official receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

8. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Awarding Official.

Sec. 8. Payment of Interest on Contractor's Claim.

1. If an appeal Is filed by the Contractor from a final decision of the Awarding Official under the disputes clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally

determined owed by the Government shall be payable to the Contractor. Such Interest shall be at the rate determined by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97), from the date the Contractor furnishes to the Awarding Official his written appeal under the disputes clause of this contract, to the date of:

(a) A final Judgement by a court of competent jurisdiction; or,

(b) Mailing to the Contractor of a supplemental agreement for execution either confirming completed negotiations between the parties or carrying out a decision of a board of contract appeals.

2. Notwithstanding 1, above:

(a) Interest shall be applied only from the date payment was due, if such date is later than the filing of appeal; and,

(b) Interest shall not be paid for any period of time that the Awarding Official determines the Contractor has unduly delayed In pursuing his remedies before a board of contract appeals or a court of competent jurisdiction.

Sec. 9. Retrocession. The Contractor agrees to comply with the provisions of section 105(e) of the Act, as amended, and be guided by the procedures in 25 CFR, Chapter V, Part 900, Subpart P in the event of retrocession.

Sec. 10. Re-assumption.

The Contractor agrees to comply with the provisions of section 109 of the Act, as amended, and be guided by the procedures in 25 CFR, Chapter V, Part 900, Subpart P in the event of re-assumption.

Sec. 11. Federal Tort Claims Act (FTCA):

1. FTCA Coverage: For purposes of FTCA coverage, the Contractor and its employees (including individuals performing personal services contracts with the Contractor to provide health care services) are deemed to be employees of the Federal government while performing work under this contract. This status is not changed by the source of the funds used by the Contractor to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the Contractor.

2. FTCA Liaison: In accordance with the requirement in 25 CFR, Part 900, Subpart L, subsection 900.188(a) the contractor agrees to designate an individual to serve as tort claims liaison with the Federal government. The tort claims liaison shall provide the assistance specified in 25 CFR, Part 900, Subpart L, subsection 900.188(c).

Sec. 12. Year 2000 (Y2K) Compliance. The Contractor shall ensure Y2K compliance in the expenditure

of contract funds for the acquisition of computer hardware or software, telecommunications, or embedded systems.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 90-0957 LH/WWD ACE

RAMAH NAVAJO CHAPTER, AND OGLALA SIOUX TRIBE, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY, UNITED STATES DEPARTMENT OF THE INTERIOR, NEIL MCCALEB, ASSISTANT SECRETARY OF INTERIOR FOR INDIAN AFFAIRS, IN HIS OFFICIAL CAPACITY, EARL DEVANEY, INSPECTOR GENERAL, IN HIS OFFICIAL CAPACITY, AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Mar. 27, 2002]

STIPULATED ORDER GRANTING PUEBLO OF ZUNI'S MOTION TO INTERVENE AND CERTIFYING A NEW CLASS CLAIM

The matter having come before the Court on the stipulated motion of the Pueblo of Zuni to Intervene, the Court being apprised in the premises, **IT IS ORDERED, ADJUDGED AND DECREED** that

1. The Motion of the Pueblo of Zuni to intervene to add claims for equitable and monetary relief for underpayment of Direct Contract Support Costs (DCSC) is **GRANTED**;

2. The complaint filed in *Pueblo of Zuni v. United States, et. al.*, CIV 00-0365, Docket No. 1, (attached hereto) shall be deemed to be the Pueblo of Zuni's Complaint in Intervention in the above-styled case;

3. The Defendants' Answer filed May 30, 2000, in the Zuni action shall be deemed to be the Defendants' Answer to Pueblo of Zuni's Complaint in Intervention and the same is incorporated by interlineation in this action;

4. The Pueblo of Zuni's Complaint in Intervention sets forth the new DCSC claim for the Pueblo of Zuni, the Ramah Navajo Chapter and the Class;

5. The new claim for DCSC is **CERTIFIED** as a Class claim for the Class previously defined in the Court's Order of October 1, 1993 (Docket No. 96);

6. Defendants shall have the right to seek decertification of the Class at a later date as to the DCSC claim, and if Defendants so choose to file a motion to decertify said claim under this reservation, Plaintiffs shall retain the burden of proof to establish all elements for class certification as to the DCSC claim for money damages or equitable relief and Plaintiffs shall not oppose such decertification on the basis of Defendants' concurrence in the Pueblo of Zuni's Motion to Intervene, the Ramah Navajo Chapter's Motion to Amend Complaint, or any Stipulated Orders relating to those motions;

7. The statute of limitations for the claims raised in the Pueblo of Zuni's Complaint in Intervention shall be deemed to have been tolled as of the time of filing of the Complaint in *Pueblo of Zuni v. United States, et. al.*, CIV 00-0365, Docket No. 1;

8. All future proceedings or rulings as to the newly added DCSC claim, or any of the other Class claims, shall be binding on the certified Class, including the intervenor Pueblo of Zuni, subject to the right of class members to opt out of the DCSC claim after notice to the class;

9. The Pueblo of Zuni shall be the Lead Class Representative for the DCSC claim, with the Ramah Navajo Chapter to be Co-Class Representative for that claim. Lloyd B. Miller, Counsel for Pueblo of Zuni, shall be Co-Class Counsel for the DCSC claim;

10. The Court's ruling on the legal issues in the pending motion and cross-motion for partial summary judgment (Docket Nos. 570 and 592) as to the indirect CSC claims for FY 1994 and thereafter in this case shall be equally binding on all Plaintiffs and Class members, including intervenor Pueblo of Zuni, as well as all Defendants as to all claims for monetary damages and/or monetary relief involving DCSC claims as set forth in the Pueblo of Zuni's attached Complaint in Intervention;

11. Within thirty (30) days of the signing of this Order, the Pueblo of Zuni will file with the Court an unopposed motion to voluntarily dismiss its separate action, No. Civ. 00-0365, without prejudice;

SO ORDERED.

/s/ LEROY HANSEN
UNITED STATES DISTRICT JUDGE

NOTED:

COUNSEL FOR THE PLAINTIFF CLASS:

/s/ MICHAEL P. GROSS
MICHAEL P. GROSS
Cause No. 90-0957
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COUNSEL FOR THE INTERVENOR PUEBLO OF ZUNI:

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COUNSEL FOR THE DEFENDANTS:

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/s/ JAN ELIZABETH MITCHELL
JAN MITCHELL
Assistant United States Attorney

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 90-0957 LH/KBM

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE, AND PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS

Filed: Aug. 27, 2008

FINAL JUDGMENT

THIS MATTER came before the Court for an August 26, 2008 Fairness Hearing on a Joint Motion for Preliminary and Final Approval of Third Partial Settlement Agreement and For an Order That Notice Be Sent to the Class (Docket No. 1138). An Order Approving the Third Partial Settlement Agreement, an Order Approving Attorneys' Fees, and an Order Approving Costs have been entered on this date. The Court's entry of these orders resolves all remaining disputed claims in this case.

IT IS HEREBY ORDERED that the Third Partial Settlement Agreement is approved and incorporated herein as the Judgment of the Court.

IT IS FURTHER ORDERED that, pursuant to the Court's Order Approving Attorneys' Fees, Class Counsel are awarded $700,000 in fees plus gross receipts tax not to exceed $57,000, based on the Santa Fe County Gross Receipts Rate, to be paid from the Reserve Accounts. Class Counsel shall receive post-judgment interest on this fee, to be paid from the Reserve Accounts, from the date of the award until paid, at a rate allowed by law. These fees shall be paid in the time-frame specified in the Court's Order Approving Attorneys' Fees.

IT IS FURTHER ORDERED that, pursuant to the Court's Order Approving Attorneys' Fees, Class Counsel are awarded an additional $25,000 in fees, plus supplemental costs, to be determined by the Court and paid from the Reserve Accounts, at the conclusion of the training program.

IT IS FURTHER ORDERED that, pursuant to the Court's Order Approving Costs, Class Counsel are awarded $17,873 in costs, to be paid from the Reserve Accounts, at the time that payment of Counsel's fee of $700,000 is made.

IT IS FURTHER ORDERED that this Court retains jurisdiction to enforce the Third Partial Settlement Agreement and to handle issues specifically delineated in Section XII of the Third Partial Settlement Agreement.

IT IS FURTHER ORDERED that Final Judgment is entered in favor of Plaintiffs. The "Settled Claims" as

defined in the Third Partial Settlement Agreement are hereby dismissed with prejudice. This Final Judgment adjudicates all existing claims and liabilities of the parties. This case is **DISMISSED** with prejudice.

IT IS SO ORDERED.

/s/ LEROY HANSEN
SENIOR UNITED STATES
DISTRICT JUDGE

Approved as to form

For Plaintiffs

/s/ MICHAEL P. GROSS
Michael P. Gross
Lead Class Counsel

/s/ C. BRYANT ROGERS
C. Bryant Rogers
Co-Class Counsel

Telephonically Approved 08/26/08
Lloyed B. Miller
Co-Class Counsel DCSC Claim

For Defendants

Telephonically Approved 08/26/08
James Todd
US Department of Justice

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. CIV 90-0957 LH/KBM ACE

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE, AND PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS

Filed: Oct. 24, 2008

NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs Ramah Navajo Chapter, Oglala Sioux Tribe, and Pueblo of Zuni, for themselves and on behalf of a class of persons similarly situated and injured, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Memorandum Opinion and Order entered August 31, 2006, denying plaintiffs' amended motion for partial summary judgment and granting defendants' cross motion for partial summary judgment, and which became appealable when the Court entered its Final Judgment on August 27, 2008. This appeal is taken against all defendants.

M.P. GROSS LAW FIRM, P.C.

/s/ MICHAEL P. GROSS
MICHAEL P. GROSS
Attorney for Plaintiffs
460 St. Michael's Drive, Suite 401
Santa Fe, New Mexico 87505
505.995.8066

Certificate of Service

I hereby certify that on October 24, 2008, a copy of the foregoing Notice of Appeal was deposited in the United States Mail at Santa Fe, new Mexico, first class postage prepaid addressed to counsel of record for Defendants and emailed, to wit:

James D. Todd, Jr.
Senior Counsel
U.S. Department of Justice
Civil Division,
Federal Programs Branch
20 Massachusetts Avenue,
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James.Todd@usdoj.gov

Jan Elizabeth Mitchell
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Civil Division
Post Office Box 607
Alburquerque, New
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/s/ MICHAEL P. GROSS
MICHAEL P. GROSS

[SEAL OMITTED]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Zuni Agency
P.O. Box 369
Zuni, New Mexico 87327

DETERMINATION AND FINDINGS
RAMAH NAVAJO CHAPTER

Contract Dispute

Ramah Navajo Chapter's (RNC) contract dispute concerning the amount of Contract Support Funds received for Fiscal Year (FY) 1994, 1995, and 1996 for Contract Numbers CTM75T72201, Real Estate Service; CTM75T72202, Natural Resources; CTM75T72203, Law Enforcement; CTM75T72204, Aid to Tribal Government; and CTM7ST72206, Facility Operation & Maintenance.

Statement of Ramah Navajo Chapter's Contract Dispute Claim

RNC is claiming that the issue in all of the above cited contracts is the failure of the Bureau of Indian Affairs (BIA) to provide indirect costs for these contracts according to the negotiated indirect cost agreements with the Department of Interior, Office of Inspector General, as required by Pub. L. 93-638, as amended. RNC totally relies on these contract support funds to fulfill their contractual obligations. These funds are needed to carry out activities, which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management.

Findings of Facts

The Awarding Official having considered Ramah Navajo Chapter's contract dispute claim, hereby makes the findings of fact to the following claims:

1. For CY 1994, the final negotiated indirect cost rate is 59.5%. The Chapter incurred $1,256,946 in direct cost, excluding capital expenditures for the audit period, January 1, 1994–December 31, 1994. The Bureau of Indian Affairs only provided $687,961 for indirect costs for the audit period, even though the Chapter is entitled to $747,883. This is a shortfall of $59,922 to which the Chapter is entitled according to P.L. 93-638, as amended.

The Awarding Official obtained records from the Federal Finance System (FFS) to review the amount of federal funds awarded to RNC for each of the contract numbers in CY 1994. (See Exhibit 1) Based on the FFS records and the Second Distribution of Fiscal Year (FY) 1994 Contract Support Funds Memorandum and Spreadsheets, dated July 25, 1994 (See Exhibit 2), BIA's figures are as follows:

* * * * *

The Awarding Official took into consideration the change in the IDC rate from 67.5% provisional rate to a 59.5% final rate and made the adjustments accordingly. The FY 1994 Distribution of Contact Support Funds spreadsheet (Exhibit 2) shows figures based on a 67.5% provisional rate. The difference in the Funds Awarded and the Direct Eligible represents passthrough funds and/or additional funds awarded after the final CSF distribution was made. Capital expenditures in the amount

of $38,283, as reflected in RNC's Annual Financial Statements and Independent Auditor's report for the Year Ended December 31, 1994 (Exhibit 3), was taken out form the Direct Eligible amount in determining the total amount of CSF need. Capital expenditures in the amount of $38, 283 represents the capital expenditures associated with each of the following programs:

Contract No.	Program Title	Amount
CTM75T72201	Real Estate Services	$ 4,028
CTM75T72202	Natural Resources	$ 2,080
CTM75T72203	Law Enforcement	$24,482
CTM75T72204	Aid to Tribal Govt.	$ 4,374
CTM75T72206	Facility Oper. & Maint.	$ 3,319
	Total Capital Expenditures	$38,283

Based on Suballotment Document No. 94-M326-003, dated June 9, 1994 (Exhibit 4), Albuquerque Area P.L. 93-638 contractors were given a total of $3,287,153 to cover 81.2106% of the identified FY 1994 contract support need as of May 1, 1994. Within this same Suballotment Document, it was stated that, "The conference report that accompanied the FY 1994 Interior Appropriation Act, directed the Bureau to allocate funding in such a manner throughout the year so that all tribes will be treated the same if there is a shortfall in contract support funds. The Bureau has identified a $17.47 million shortfall. These funds are allocated pursuant to the procedures contained in the Federal Register Notice published on December 28, 1993, 58FR 68694 (Exhibit 5)."

The Awarding Official having made the adjustment in the 59.5% final IDC rate and subtracting of the capital expenditure of $38, 283 from direct eligible shows an amount of $553,525 of CSF need at the 81.2106% distri-

bution rate for CY 1994. A total amount of $648,934 was awarded to RNC in CY 1994. Consequently, BIA over awarded RNC by $95, 409 for CY 1994.

RNC is claiming they are entitled the 100% of CSF for CY 1994 or $747,883 using the final IDC rate of 59.5% ($1,256,946 X 59.5% X 100% = $747,882.87).

The Awarding Official, of behalf of BIA, considers the 81.2106% CSF distribution rate to be an equitable distribution rate for all tribes. Further, the total amount of $91,223,000 was made available pursuant to P.L. 103-138, which represents 100% of the amount available for CSF that the Bureau can pay in FY 1994 to P.L. 93-638 contractors for indirect costs (See Exhibit 5). Of the 100% appropriated amount or $91,223,000, the Albuquerque Area received $3,287,153 to cover 81.2106% of the identified FY 1994 contract support need as of May 1, 1994. Consequently, during the final distribution, RNC was awarded 81.2106% of CSF based on a 67.5% IDC rate. Adjustments have been made to reflect the final approved IDC rate of 59.5%, thereby, yielding an over award of $95,409.

2. For CY 1995, the negotiated indirect cost rate is 72.4%. The Chapter incurred $1,182,810 in direct cost, excluded capital expenditures for the audit period, January 1, 1995–December 31, 1995. The Bureau of Indian Affairs only provided $848,687 for indirect costs for the audit period, even though the Chapter is entitled to $856,354. This is a shortfall of $7,667 to which the Chapter is entitled according to P.L. 93-638, as amended.

* * * * *

The Awarding Official obtained records from the Federal Finance System (FFS) to review the amount of federal funds awarded to RNC for each of the contract numbers in CY 1995. (See Exhibit 1) Based on the FFS records, BIA's figures are as follows:

* * * * *

The Awarding Official calculated a total CSF need of $825,609 based on the 72.4% provisional IDC rate at the 91.74313% CSF distribution rate. Using RNC's Annual Financial Statements and Independent Auditor's Report for the Year Ended December 31, 1995 (Exhibit 6), capital expenditures in the amount of $61,914 were taken out of Direct Eligible amount in determining the total amount of CSF need.

* * * * *

Based on the Second Distribution of Fiscal Year (FY) 1995 Contract Support Funds Memorandum, dated August 30, 1995 (Exhibit 7), each office was directed to distribute CSF at 91.7413% of the identified need for those contractors with approved FY 1995 IDC rates. The memorandum also stated, "The FY 1995 Appropriations Act gives the tribes the flexibility to reprogram within tribal priority allocations to obtain full recovery of indirect costs if a shortfall in contract support were to occur." A copy of the distribution of CSF was attached to this memorandum.

After subtracting the capital expenditures of $61,914, the total amount of CSF need at the 91.74313% distribution rate for CY 1995 is $825,609. A total amount of $729,693 was awarded to RNC in CY 1995. Consequently, BIA under awarded RNC by $95,916 for CY 1995.

Contract Modification No. 51 for Contract No. CTM75T72202, Natural Resources effecting an increase of $174,258 in CSF was signed by BIA and RNC's President on September 29, 1995, however, these funds were not obligated by BIA and therefore, never available to RNC (Exhibit 8). The Awarding Official was unable to determine how the Contracting Officer at that time derived the amount of $174,258, however, since the contract modifications was signed by both parties, this amount is used in the calculation of CSF need. An additional amount of $16,319 (250, 764–$234,445) was added to the 1994 CSF need at 91.74313% reflecting a total CSF need of $825,609.

RNC is claiming they are entitled to 100% of CSF for CY 1995 or $856,354 using the provisional IDC rate of 72.4% ($1,182,810 X 72.4% X 100% = $856,354).

The Awarding Official, on behalf of BlA, considers the 91.74313% CSF distribution rate to be an equitable distribution rate for all tribes. Furthermore, the total amount of $103,125,653 was made available pursuant to P.L. 103-332, which represents 100% of the amount available for CSF that the Bureau can pay in FY 1995 to P.L. 93-638 contractors for indirect costs (See Exhibit 9). Of the 100% appropriated amount or $103,125,653, each Area office was directed to distribute 91.74313% of the identified FY 1995 contract support need.

3. For CY 1996, the negotiated indirect cost rate is 72.4%. The Chapter incurred $1,132,632 in direct cost, excluding capital expenditures for the audit period, January 1, 1996–December 31, 1996. The Bureau of Indian Affairs only provided $738,744 for indirect costs for the audit period, even though the

Chapter is entitled to $820,026. This is a shortfall of $81.282 to which the Chapter is entitled according to P.L. 93-638, as amended.

* * * * *

The Awarding Official obtained records from the Federal Finance System (FFS) to review the federal funds awarded to RNC for each of the contract numbers in CY 1996 (See Exhibit 1). Based on the FFS records and 86.8959% CSF distribution rate for FY 1996 (See Exhibit 10), BIA's figures are as follows:

* * * * *

The Awarding Official calculated a total CSF need of $705,425 based on the 72.4% carryforward IDC rate. This amount is based on an 86.8959% CSF distribution rate.

Using RNC's Annual Financial Statements and Independent Auditor's Report for the Year Ended December 31, 1996 (Exhibit 11), capital expenditures in the amount of $8,763 ($6,237 from Law Enforcement and $2,526 from Aid to Tribal Government) were taken out of the Direct Eligible amount in determining the total amount of CSF need.

After subtracting the capital expenditures of $8,763, the total amount of CSF need at the 86.8959% distribution rate for CY 1996 is $705,425. A total amount of $710,937 was awarded to RNC in CY 1996. Consequently, BIA over awarded RNC by $5,512 for CY 1996.

RNC is claiming 100% of CSF for CY 1996 or $820,026 using the carryforward IDC rate of 72.4% ($1,132,632 X 72.4% X 100% = $820,026).

The Awarding Official, on behalf of BIA, considers the 86.8959% CSF distribution rate to be an equitable distribution rate for all tribes. Furthermore, the total amount of $90,829,000 or 100% CSF appropriation was made available for CY 1996 that the Bureau can pay in FY 1996 to P.L. 93-638 contractors for indirect costs (See Exhibit 10). Of the 100% appropriated amount or $90,829,000, each Area Office was directed to distribute 86.8959% of the identified FY 1996 contract support need.

4. Copies of the Negotiated Indirect Cost Agreements for Calendar Years (CY) 1994, 1995, and 1996 between Ramah Navajo Chapter and the Department of Interior, Office of Inspector General have been made a part of RNC's dispute. See Exhibit 12.

The Awarding Official has reviewed Report No. 96-P-1236(94F) and 96-P-1235(96) dated September 16, 1996 of the Indirect Cost Negotiation Agreement and concurs with the approved indirect costs rates as shown below:

Type	Effective Period	Rate*
Final	1/1/94 to 12/31/94	59.5%
Provisional	1/1/95 to 12/31/95	72.4%
Fixed Carryforward	1/1/96 to 12/13/96	72.4%

*The Base is calculated as Total Direct costs, less capital expenditures and passthrough funds. Passthrough funds are normally defined as major subcontracts ($5,000 or more), payments to participants, stipends to

eligible recipients, and subgrants, which normally require minimal administrative effort.

5. The Awarding Official was unable to obtain all the official contract files stored at the Albuquerque Area Office due to the Hanta Virus Alert Notice. Due to the Hanta Virus Alert Notice, all personnel are restricted from entering the storage buildings.

The Awarding Official relied heavily on the FFS records. Federal Register Notices on CSF, Memorandums concerning the second distribution of CSF, and the records provided by RNC in determining the CSF need.

The figures provided by RNC and the Awarding Official vary greatly for each of the contracts.

Determinations

Now therefore:

Based on the foregoing, I hereby determine that:

A. The contract support funds sought by Ramah Navajo Chapter in the amount of $148,871 plus interest under the identified Contract Nos. CTM75T72201, Real Estate Services; CTM75T72202, Natural Resources; CTM75T72203, Law Enforcement; CTM75T72204, Aid to Tribal Government; and CTM75T72206, Facility Operation & Maintenance for Calendar Years 1994, 1995, and 1996 is valid to some degree.

B. The information obtained from the Federal Finance System and all other documents included in the Exhibits were used in determining the amount owed to Ramah Navajo Chapter. For each of the calendar years, the following amounts were derived:

1. CY 1994: BIA awarded an excess of $95,409 to RNC. The total amount of CSF need at the 81.2106% distribution rate is $553,525. RNC received $648,934 in CSF for CY 1994. This was a direct result of the change in the CY 1994 IDC rate from a 67.5% provisional rate to a 59.5% Final IDC rate.

2. CY 1995: The total amount of CSF need at the 91.74313% distribution rate is $825,609. RNC was awarded $729,693 for CY 1995. This led to a shortfall of $95,916 in CSF need for RNC.

3. CY 1996: The total amount of CSF need at the 86.8959% distribution rate is $705,425. RNC was awarded $710,937 for CY 1996. Therefore, BIA awarded an excess of $5,512 in CY 1996.

C. It is further determined that RNC is entitled to a total amount of $6,019 plus interest for CY 1994, 1995, and 1996.

/s/ [ILLEGIBLE]
(Signature)

Awarding Official
(Title)

[2/8/99]
(Date)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUDGET JUSTIFICATIONS, F.Y. 1995

[SEAL OMITTED]

BUREAU OF INDIAN AFFAIRS

NOTICE: These budget justification s are prepared for the Interior and Related Agencies Appropriations Subcommittees. Approval for release of the justifications prior to their printing in the public record of the Subcommittee hearings may be obtained through the Office of Budget of the Department of the Interior.

* * * * *

Contract Support

Objectives:

- To ensure that tribes or tribal organizations have sufficient funds to operate and administer contracts thereby furthering the intent of the Indian Self-Determination Act, *Public Law 93-638*, as amended.
- To provide, within available resources, the contract support funding that contractors are authorized to receive under the Act based on indirect cost rates negotiated and determined by the Inspector General.

FY 1994 Plans and Accomplishments ($84,808,000): Funds are used by tribal contractors to adhere to the terms of a contract(s) to cover the cost of activities which are not normally carried out by the Secretary of the Interior in the operation of a program or which are provided from funds other than those under contract. Contract support funding is provided within available resources to tribal organizations which are authorized under Section 106 (a)(2) of the Indian Self-Determination and Education Assistance Act, as amended.

In FY 1993, the Bureau requested a reprogramming of $15.4 million to cover a shortfall in contract support. The Congress approved a reprogramming of $10.1 million from other Bureau programs to partially fund the shortfall. The Congress included language in the FY 1994 Appropriations Act *(Public Law 103-138)* which limits the amount of funds available for indirect cost payments and directed that a portion of the funds be used to cover contract support shortfalls from previous

years. Currently, the Bureau estimates that $13.1 million will be needed to cover the FY 1992 and FY 1993 shortfalls. Conference Report 103-299 further directed that the Bureau treat tribal contractors on an equal basis if a shortfall occurs in FY 1994.

This directive was included in a *Federal Register* notice published in December, 1993. The notice also advised tribes and tribal contractors that the Bureau anticipates a FY 1994 contract support fund shortfall in the range of $10 million to $25 million. Therefore, the Bureau has established two criteria for funding indirect cost needs in FY 1994. A tribal contractor is eligible for contract support if a current approved indirect cost rate, or a proposal pending before the Office of the Inspector General on, or prior to, May 1, 1994, has been submitted. The new or renewed contracts must also be approved on or before the same date.

In December, 1993, the Bureau distributed $44.9 million to the Area Offices to meet up to 50 percent of the eligible contractors' indirect cost needs. An additional $13.1 million was also distributed to cover the known prior year shortfalls. The Bureau will distribute additional funds from the remaining $26.8 million to cover other prior year shortfalls which may arise before May 1, 1994. After this date, the remainder of the funds for contract support will be distributed on a pro rata basis to address the remaining FY 1994 indirect cost needs.

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[SEAL OMITTED]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Zuni Agency

P.O. Box 369

Zuni, New Mexico 87327

[Sept. 28 1999]

Through: Superintendent, Ramah Navajo Agency
9-29-99

Martha H. Garcia, President
Ramah Navajo Chapter
Rt. 2, Box 13
Ramah, New Mexico 87321

Dear President Garcia:

Enclosed, for your review and signature, is Modification No. 26 to Contract No. CTM75T72208, Model Contract.

By this modification, the contract is increased by including the final distribution of Fiscal Year (FY) 1999 Contract Support Funds of $310,560.00, which represents the amount authorized for funding at the 88.3% CSF need.

If you are in concurrence with the contents of this modification, please sign each document in bloc 15B of the Standard Form 30, retain one copy for your files, and return one original set to this office. Any unauthorized changes shall void the documents completely and will require reprocessing.

Should you have any questions concerning this modification, please call me at (505) 782-5591.

Sincerely,

/s/ [ILLEGIBLE]
Awarding Official

Enclosures

[SEAL OMITTED]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Zuni Agency

P.O. Box 369

Zuni, New Mexico 87327

[Sept. 22 1998]

Through: Superintendent, Ramah Navajo Agency

Martha H. Garcia, President
Ramah Navajo Chapter
Rt. 2, Box 13
Ramah, New Mexico 87321

Dear President Garcia:

Enclosed, for your review and signature, is Modification No. 13 to Contract No. CTM75T72208, Model Contract.

If you are in concurrence with the contents of this modification, please sign each document in bloc 15B of the Standard Form 30, retain one copy for your files, and return one original set to this office. Any unauthorized changes shall void the documents completely and will require processing.

Should you have any questions concerning this modification, please call me at 782-5591.

Sincerely,

/s/ [ILLEGIBILE]
Awarding Official

Enclosures

cc: Supt., Ramah Navajo Agency

* * * * *

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Contract No. CTM75T72208, Model Contract is modified as follows:

1. The contract is increased by including the final distribution of Fiscal Year (FY) 1998 Contract Support Funds (CSF) of $136,674.00, which reflects 80.34 percent of CSF need as authorized.

* * * * *

[SEAL OMITTED]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Albuquerque Area Office

P.O. Box 26567

Albuquerque, New Mexico 87125-6567

[Sept. 24 1997]

Through: Superintendent, Ramah Navajo Agency

Martha H. Garcia, President
Ramah Navajo Chapter
Rt. 2, Box 13
Ramah, New Mexico 87321

Dear President Garcia:

Enclosed, for your review and signature, is Modification No. 5 to Contract No. CTM75T72208, Model Contract.

By this modification, the contract is increased for a total of $33,861.00, of which $10,000.00 represent the direct cost funds for Program E - Facilities Management, and $23,861.00 represent the final amount of Fiscal Year (FY) 1997 Contract Support Funds (CSF) authorized at 77 percent of CSF need by the 1997 Omnibus Appropriations Act (Pub. L. 104-208).

If you are in concurrence with the contents of this modification, please sign in the block 15B of the Standard Form 30, retain one copy for your files, and return the original to this office through the Agency Superintendent for obligation. Any unauthorized changes shall void this document and will require processing.

You are requested to sign the subject modification promptly in order to effect the Bureau's Federal Finance System prior to the end of the fiscal year, or September 30, 1997.

If you require additional information and/or assistance, please contact Darlene S. Gonzales, Area Self-Determination Specialist, Branch of Contracts and Grants, at (505) 766-2913.

Sincerely,

/s/ [ILLEGIBILE]
Contracting Officer

Enclosure

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NO: 90-0957 LH/WWD

RAMAH NAVAJO CHAPTER, PLAINTIFF

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR; KEVIN GOVER, ASSISTANT SECRETARY OF THE INDIAN AFFAIRS; ROBERT J. WILLIAMS, ACTING INSPECTOR GENERAL; U.S. DEPARTMENT OF THE INTERIOR; AND THE UNITED STATES OF AMERICA, DEFENDANTS

Friday, Jan. 21, 2000
9:18 a.m.

DEPOSITION OF BENJAMIN H. NUVAMSA

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* * * * *

[55]

A. Because of the appropriations that we receive, you know we cannot distribute or make 100 percent of the funds available to any contractor.

Q. (BY MR. GROSS) And all I'm getting at, to say is, the typical contractor is taking a risk if it spends all of its indirect cost pool under that circumstance, even though it's performing the base contract during that same period of time, right?

A. That's correct.

Q. And assuming that the negotiation of the indirect cost rate tried to provide for prudent management of the program and allowing the contractor to meet the terms of the contract, then for the [56] contractor to do that, namely operate the program prudently and meet the terms of the contract, he, presumably, has to spend the indirect cost pool, right?

A. That's correct.

Q. Would you agree with me?

A. Yes.

Q. Would you then agree with me, Ben, that if the contractor tries to be fiscally prudent by not spending the entire pool that it's authorized to spend under the rate, he's taking the gamble that he will not be in compliance with the contract terms in other respects or will not be managing the program prudently?

MR ZAVITZ: I object to that. That calls, again, for legal conclusions, assumes facts not in the hypothetical, but he can answer.

Q. (BY MR. GROSS) Can you answer the question?

A. I would rather stick with him.

* * * * *

[61]

* * * * *

Q. Have any of your recommendations in your report been adopted by the Bureau of Indian Affairs?

A. Not at this point.

Q. Are they under review?

MR. ZAVITZ: If you know.

A. I don't know.

Q. (BY MR. GROSS) Had your work group been disbanded?

A. Yes.

Q. I mean, now that the report—

A. As far as I know, it's been disbanded.

Q. At any time did anyone in the Bureau of Indian Affairs question any of the data or information that makes up the body of the report?

A. No.

* * * * *

[62]

Q. There's a chart called figure 4.8. What is this chart representing?

A. It represents, at best, a 10-year history of the bureau's contract support appropriations and distribution.

Q. Where did the data that makes up the body of the chart come from?

A. It came from the BIA sources, and also reference material from the Pacific Northwest publication.

Q. And where did that publication draw its data from, if you know?

A. From the Bureau of Indian Affairs.

Q. So, essentially, all the data here came from the BIA?

A. Yes.

Q. I note at the bottom there's a footnote. It says, "Source: BIA 1999. Notes: The above data is subject to revision. It was difficult to ascertain the true amounts because of changing data in reported contract support needs, which result in changes in distribution tables."

Have you since learned of any particular entry [63] in this chart that needs to be corrected?

A. No.

Q. Is it safe to conclude that the data is generally correct? I don't know what that means exactly, but there's no large scale major mistakes in the information.

A. That's correct.

* * * * *

[66]

* * * * *

Q. Let's look at the GAO report, and unfortunately, it's going to take me a minute to find it. Yes. It didn't take me that long. If you'll turn to page 25 of the GAO report, in the last full paragraph above the footnote, the last sentence says, "During this period, neither agency," referring to IHS and BIA, "has requested full funding for these costs, nor has the Congress appropriated full funding for them."

That would seem, would you agree to dovetail with the informaiton in your figure 4.8; is that right?

A. That's correct.

Q. Do you know where GAO took it's data from?

A. They also received—obtained data from the BIA.

* * * * *

[67]

* * * * *

A. Could you repeat the statement.

Q. Okay. In every year, except, perhaps, 1996, the president's budget request to Congress did not include a level of contract support meeting 100 percent of the estimated need; is that true?

A. Yes.

* * * * *

Exhibit 1 to Nuvamsa Deposition

Chapter 4 - FINDINGS

Introduction

Congress and past administrations have been concerned that the cost of contracting and compacting Bureau programs is increasing. They are concerned that tribal indirect cost rates are rising uncontrollably and believe that this contributes directly to the rising cost of contracting and compacting Bureau programs. Some suspect there is widespread misuse of indirect cost rates by Indian tribes. Others are concerned over the effectiveness of the system in controlling costs and in the accounting and allocation burdens that the current system imposes. While some federal managers are asserting that this is simply gaming the system, Indian tribes, on the other hand, faced with contract support shortfalls and their own fiscal pressures, have explicitly pursued legislative reforms and policies for administrative cost maximization, as evidenced by the 1988 and 1994 amendments to the Act.

The Work Group on Contract Support Costs was assigned in June 1998 to study the problems associated with contract support shortfalls, to develop solutions, and to gather relevant data to verify whether the above perceptions have merit. To do this, the Work Group was assigned to document trends in: (1) tribal indirect cost rates, (2) contracting and compacting of Bureau programs; (3) Bureau staffing levels; and (4) a comparison of indirect cost rates between Indian tribes and other organizations that receive federal funding for overhead costs, such as hospitals, universities, and non-profit organizations.

After a thorough review, the Work Group found there are two primary causes of the contract support shortfall faced by Indian tribes:

- Insufficient annual appropriations for contract support costs; and
- Administrative and statutory limitations imposed by other non-Bureau and non-Indian Health Service agencies from paying their full share of tribal overhead costs.

Other findings of the Work Group can be summarized to the following:

- Tribal indirect cost rates are not out of control. In fact, tribal indirect cost rates have remained relatively flat in recent years. In addition, the average aggregate indirect cost rate of Indian tribes comparatively, is much lower than the average aggregate rate of universities.
- In comparison to average aggregate indirect cost rates of universities (51.96 or 52 percent), tribal indirect costs in the aggregate, for the period 1992 to 1996, averaged just under 24.0 percent.
- There is no evidence of abuse of the system by tribes. However, there may be a few instances where there is misapplication of indirect cost rates, due largely to lack of training and a lack of a consistent contract support policy. This affects the amount of contract support funds distributed to tribes and the level of contract support needed by the Bureau.

- As discussed in Chapter 3, increasing indirect cost rates do not automatically mean rising cost of contracting and compacting Bureau programs.
- Contract support shortfalls at this time, affect only ongoing or recurring contracted and compacted programs (including school grants). So far, the ISDF, in the Bureau, has been sufficient to fund all requests for startup costs and contract support costs for new and expanded contracts.
- Contract support funding by the Bureau during the period Fiscal Year 1990 through Fiscal Year 1999, averaged 83 percent, resulting in an average shortfall of 17 percent, or an average annual shortfall of $16,368,400. This shortfall, however, does not account for the "true" shortfall if Sec. 106(a)(2) requirement is applied to the need.
- Tribal indirect cost pools increased proportionally (a ratio of approximately 4:1) with increases in direct program appropriations due to increased accountability for funds and partly to increased contractual requirements.
- Contracting and compacting of Bureau programs have leveled off in recent years, due mainly to contract support shortfalls and other considerations.
- Bureau staffing levels have decreased significantly, partly due to contracting and compacting of Bureau programs by tribes. A significant reduction in staffing occurred in Fiscal Year 1996 due to budget cuts and "buy-out" retirement options offered by Congress in Fiscal Years 1994 through 1996.

Research by the Work Group revealed that, while tribal indirect cost rates for Fiscal Year 1988 through Fiscal Year 1998, in the aggregate, averaged 24 percent, the average aggregate indirect cost rate of universities and colleges was 52 percent. The purpose of this comparison was to reveal the differences in the recovery of federal funds between Indian tribes and universities. Unfortunately, due to the time frame given for this report and the complexities of the Freedom of Information Act (FOIA), the Work Group was unable to obtain this data. However, research revealed the Bureau was only able to fund approximately 83 percent of the contract support need of Indian tribes, meaning there was an average of approximately 17 percent shortfall during the period Fiscal Year 1990 through Fiscal Year 1999. This amount, however, does not reflect what the need would be if the statutory funding requirement in Sec. 106(a)(2) of the Act is applied.

* * * * *

Contract Support Funding History

As stated previously, the Bureau, in 1976, began paying for indirect costs of Indian tribes operating Bureau programs under the Act from a special line item in the Bureau budget entitled Contract Support Funds. There have been a variety of methods used by the Bureau to distribute these funds to Indian tribes.

Figure 4.8 on the following page shows that contract support funding has not kept pace with the needs of Indian tribes. The table shows that the average percentage of contract support distribution during the period Fiscal Year 1990 through Fiscal Year 1999 has been at 83 percent, or an average shortfall of 17 percent. These

amounts, however, do not represent what the need would be if the full funding obligations (i.e. Sec. 106(a)(2) amounts) were applied. As previously discussed in this chapter, data for Fiscal Year 1997 differ from the Bureau's Fiscal Year 1997 Contract Support Funds report to Congress, which indicates that data for other fiscal years may also be different.

The 10 year history of the Bureau's contract support appropriations and distribution shows the following:

Figure 4.8 ($ in 000's)

(Col. 1) Fiscal Year	(Col. 2) CSF Need	(Col. 3) Budget Request	(Col. 4) Enacted	(Col. 5) % Funded	(Col. 6) Shortfall (Col. 2-4)	(Col. 7) % Shortfall
1990	69,364	49,386	56,386	81%	12,978	19%
1991	64,034	44,386	53,107	83%	10,927	17%
1992	66,320	57,440	53,107	80%	13,213	20%
1993	85,189	57,703	65,223	77%	19,966	23%
1994	92,981	83,808	84,808	91%	8,173	9%
1995	103,945	95,823	95,640	92%	8,305	8%
1996	104,526	109,626	90,829	87%	13,697	13%
1997	117,346	110,608	90,829	77%	26,517	23%
1998	131,714	105,829	105,829	80%	25,885	20%

1999	138,914 *	114,917	114,891	83%	24,023 *	17%*
2000	144,624 *	121,338	121,338 *	84%	23,286 *	16%*

Source: BIA, 1999. Notes: The above data is subject to revision. It was difficult to ascertain the true amounts because of changing data in reported contract support needs, which result in changes in distribution tables.

A number of events occurred throughout the Bureau's contract support history. In some years, the Bureau was directed, through the annual appropriations to pay prior year shortfalls, while in other years, there were limitations imposed on payment of other prior year claims. The Bureau was directed, in Fiscal Year 1994 for example, to pay prior year shortfalls first before making payments on current needs. A total of $15.4 million was identified as prior year shortfall, leaving only $75.9 to pay current needs and resulting in the Fiscal Year 1994 shortfall of as high as $25.0 million. At the same time, the Bureau was prohibited from reprogramming other funds into the contract support budget.

Fiscal Year 1994 marked the beginning of the Congressionally mandated caps on contract support funding. Without these caps, the Bureau would have been required to reprogram funds from other Bureau programs to meet the funding requirements for contract support.

* * *

TRANSCRIPT OF TRIAL PROCEEDINGS

[5]

Whereupon,

JAMES J. THOMAS

having been duly sworn, was called as a witness and was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFFS

BY MR. GROSS:

Q Would you please state your name for the record?

A James J. Thomas, T-H-O-M-A-S)

(Deposition Exhibit No. 1 was marked for identification.)

BY MR. GROSS:

Q Are you here as a representative or designatee by the Department of the Interior, the Defendants, for this deposition?

A I am representing the Bureau of Indian Affairs.

Q Okay.

A Not necessarily the whole department.

Q But you understand that you are a designated representative of the Bureau of Indian Affairs for this deposition?

A Yes.

* * * * *

[16]

* * * * *

Q Mr. Thomas, on the stipulations, which is Exhibit 2, which I think you did help to compile?

A Yes.

Q Do you remember point number two, which says that in each fiscal year, including and following Fiscal Year '94, the amount earmarked in the relevant appropriations to Act was insufficient to pay a hundred percent of contract support costs for ongoing contracts, grants, and compacts, as calculated by multiplying each contractors and compactors indirect cost rate, times its eligible BIA funding as set forth in the indirect cost agreements. Are you in agreement with that statement?

A Yes, I am.

Q And is that the position of the Department?

A Yes.

* * * * *

[24]

* * * * *

Q Okay. By the way, while we are on Fiscal Year 1992, are you aware of the fact that in the Fiscal Year 1994 appropriation there was language included authorizing the Bureau of Indian Affairs to pay prior year shortfalls?

A Yes.

Q Do you know whether any Fiscal Year '94 funds were used to pay Fiscal Year '92 shortfalls in contract support?

A I believe they were, yes.

Q Do you know how much?

* * * * *

[46]

* * * * *

Q Let me direct you to page 34 and 35 if you would. At the bottom of page 34, there is a sentence that begins, "The 1988 amendments to the Act require the agencies to provide contract support costs to tribes for their reasonable costs associated with administering BIA's and HHS' programs. However, since at least 1993, neither BIA nor HHS has requested full funding for these costs, nor has the Congress appropriated full funding for them."

Do you have any reason to disagree with that statement?

A Well, I would not disagreement, but I would say that it baffles me as to how they would know the bureau's request, which is usually done internally as part of the departmental—the department is part of the body that deals with OMB.

Q Well, let me ask you. Aren't there annual budget justifications that make up the BIA request, or the total Interior Department request to the Congress for [47] appropriations?

A Yeah. Maybe that's the point that I am making, that it would be a departmental—it is part of the departmental request.

Q My point is that aren't there pages and pages of components to that budget, those annual budget justifications dealing with the Bureau of Indian Affairs?

A Yes. My point is that the bureau does not request dollars from Congress as an entity.

Q Okay. But I am assuming—

A The request—

Q This is my assumption.

A —comes from the President to Congress. In other words, the Bureau cannot by itself go to Congress and say this is what we need. It has to be done in the context of the administration's budget request. But other than that, I don't have any reason to question that statement.

MR. ZAVITZ: I think what he is saying is that with the clarification that the President's budget request did not request full funding—

THE WITNESS: Right.

MR. ZAVITZ: —would be an accurate statement. And I guess he is saying that it is not necessarily—the budget's request does not necessarily reflect what. BIA internally had requested.

[48] THE WITNESS: Yes.

* * * * *

[60]

* * * * *

Q So given the fact that the direct program monies are known relatively early in the fiscal year, but he indirect component of their budgets are not known, in terms of the exact amount they are going to get until relatively towards of the end of the fiscal period, what would you say a prudent operator should do, in terms of sticking within the constraints of prudent management?

MR. ZAVITZ: I would object on the basis that that calls for a hypothetical—

THE WITNESS: Well, it would depend—

MR. ZAVITZ: —opinion, and he has not been designated as an expert really as the agency's representative. But he can express an opinion if he has one.

[61]

THE WITNESS: Yes. My opinion on that is it depends on the situation that the tribe is in financially. Many tribes supplement dollars, and are able to spend—

BY MR. GROSS:

Q What do you mean?

A Use their own dollars as part of their—to use as indirect dollars. Tribes that cannot do that have to be more cautious, but that is just my opinion.

Q In your opinion are programs likely to suffer if they can't supplement these indirect costs that are unknown throughout most of the fiscal year?

A Yes.

* * * * *

[62]

* * * * *

Q But given yearly shortfalls in contract support funds, how is a contractor supposed to carry on in your view?

A Well, we have tried in the bureau—recognizing that we do have shortfalls, we have tried to make other options available.

And one option is for contractors to use monies, direct program dollars, to meet their indirect rates. In other words, they have the option to pay their full indirect rate from the total amount of dollars that they have, including the program dollars.

Q Well, if the contractor did that, wouldn't that mean that the program level would be less than if the program were operated by the Bureau of Indian Affairs?

A Well, I wouldn't say less than if it was operated by the Bureau of Indian Affairs. But certainly it would be [63] less than the dollars that they have gotten awarded as direct program dollars.

Q Well, isn't it true that the Secretary operates the programs at the level that Congress appropriates the money for, right?

A Yes, that's right.

Q And then the Secretary's own overhead costs are paid for from other parts of his appropriation, right?

A That's correct, yes.

Q So I guess unless the Secretary wants to risk the ire of Congress, he runs the programs at the level that he gets the appropriation for; is that right?

A That's correct.

Q Now, on the other hand, Tribe X comes to the Secretary and says I want to run this program. Isn't it true that the law assumes that the program is supposed to be operated at the same level that the Secretary would?

MR. ZAVITZ: I would object. That calls for a legal conclusion.

THE WITNESS: Well, yes.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 90-0957 LH/WWD

RAMAH NAVAJO CHAPTER, ET AL., PLAINTIFFS

v.

BABBITT, ET AL., DEFENDANTS

CLARIFICATION OF DEFENDANTS' RESPONSE TO INTERROGATORIES

Defendants, by and through counsel, clarify the answer to the First Post Remand Interrogatories as follows:

INTERROGATORY NO. 1: What was the amount of the surplus from Interior appropriations reported to the Treasury by the Bureau of Indian Affairs for each of the following fiscal years: FY 1992, FY 1993, FY 1994, FY 1995, FY 1996, FY 1997, FY 1998 and FY 1999?

Answer: Surplus is not a term used in the federal appropriation context. The following answers are provided to the extent we understand your question:

The unexpended balance of fiscal year 1992 Operation of Indian Programs funds at the close of fiscal year 1992 was $225,574,086. The unobligated balance of fiscal year 1992 Operation of Indian Programs funds at the close of fiscal year 1992 was $7,207,158.

The unexpended balance of fiscal year 1993 Operation of Indian Programs funds at the close of fiscal year 1993 was $209,452,380. The unobligated balance of fiscal year 1993 Operation of Indian Programs funds at the close of fiscal year 1993 was $19,348,370.

The unexpended balance of fiscal year 1994 Operation of Indian Programs funds at the close of fiscal year 1994 was $228,059,853. The unobligated balance of fiscal year 1994 Operation of Indian Programs funds at the close of fiscal year 1995 was $9,390,539.

The unexpended balance of fiscal year 1995 Operation of Indian Programs funds at the close of fiscal year 1995 was $207,376,082. The unobligated balance of fiscal year 1995 Operation of Indian Programs funds at the close of fiscal year 1995 was $17,211,181.

The unexpended balance of fiscal year 1996 Operation of Indian Programs funds at the close of fiscal year 1996 was $194,003,481. The unobligated balance of fiscal year 1996 Operation of Indian Programs funds at the close of fiscal year 1996 was $11,466,311.

The unexpended balance of fiscal year 1997 Operation of Indian Programs funds at the close of fiscal year 1997 was $184,650,598. The unobligated balance of fiscal year 1997 Operation of Indian Programs funds at the close of fiscal year 1997 was $13,704,230.

The unexpended balance of fiscal year 1998 Operation of Indian Programs funds at the close of fiscal year 1998 was $30,924,712. The unobligated balance of fiscal year 1998 Operation of Indian Programs funds at the close of fiscal year 1998 was $12,383,612.

The unexpended balance of fiscal year 1999 Operation of Indian Programs funds at the close of fiscal year 1999 was $33,508,926. The unobligated balance of fiscal year 1999 Operation of Indian Programs funds at the close of fiscal year 1999 was $17,927,336.

Respectfully Submitted,

ROBERT J. GORENCE
Acting United States Attorney

/s/ JOHN W. ZAVITZ
JOHN W. ZAVITZ
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, NM 87103
(505)224-1505

[U.S. Department of the Interior, Budget Justifications, FY 1999 (excerpt)]

Contract Support

Program Description ($105,829,000): The goal of this program is to strengthen and stabilize administrative structures of Tribes and tribal organizations currently contracting and compacting under the authority of *P.L. 93-638,* which authorizes federally recognized Tribes to contract or compact programs currently operated by the Bureau. Tribes that exercise this authority are entitled to receive the total amount of funding used by the Bureau in operating the program being contracted. In addition to program funding, *P.L. 93-638,* Sec. 106(a)(2), requires the Bureau to pay tribal contractors contract support costs which include tribal indirect costs. These costs reflect tribal contractors' administrative or overhead expenses and are determined through negotiation between a tribal contractor and the OIG, which results in a tribal indirect cost rate expressed in a percentage of the amount contracted. The inability of the Bureau to fund 100 percent of identified contract support costs serves as a disincentive to increased contracting or compacting of federal programs.

In FY 1997, the Bureau was only able to pay about 77 percent of tribal indirect costs. The capability of tribal contractors to manage and administer contracts is impaired when full funding of indirect costs is not provided. Specifically, contract support funds are utilized by tribal contractors to pay a wide range of administrative and management costs including but not limited to finance, personnel, maintenance, insurance, utilities, audits, communications, and vehicle costs. Inadequate funding of

these costs weaken tribal administrative structures and negatively impact the direct delivery of program services.

The following table summarizes the Contract Support requirements and funds provided for FY 1997 and estimates for 1998 and 1999:

	1997 Actual	1998 Estimate	1999 Estimate
Total Need ($000)	117,346	126,265	128,265
Amount Funded ($000)	90,829	105,829	114,917
Percent Funded	77	84	90
Shortfall ($000)	26,517	20,436	13,348
Percent Shortfall	23	16	10

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV No. 90-0957 LH/WWD

RAMAH NAVAJO CHAPTER AND OGLALA SIOUX TRIBE, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS

Aug. 7, 2001

SECOND AFFIDAVIT OF CLASS COUNSEL MICHAEL P. GROSS IN SUPPORT OF AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

The undersigned being first duly sworn hereby deposes and states:

1. I am Class Counsel in the above-styled matter and was Counsel of Record for Respondent in *Babbitt v. Oglala Sioux Tribal Public Safety Comm'n*, an appeal from the Interior Board of Contract Appeals to the Court of Appeals for the Federal Circuit, Docket No. 99-1033, 164 F.3d 1374 (Fed. Cir. 1999).

2. Attached and made part of this affidavit are true and correct excerpts from the Answer Brief of the Re-

spondent and Reply Brief of the Appellant (Government) in that case.

MORE AFFIANT SAYETH NOT.

/s/ MICHAEL P. GROSS
MICHAEL P. GROSS

* * * * *

[Excerpt from Answer Brief of the Respondent and Reply Brief of the Appellant]

The Secretary is not arguing, as Oglala Sioux suggests at page 30 of its Brief, that the subsequent appropriations acts repealed any portion of the ISDA, by implication or otherwise, only that they determined the amount of appropriations "available" for contract support costs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 90-0957 LH/WW

RAMAH NAVAJO CHAPTER, ET AL., PLAINTIFFS

v.

BRUCE BABBIT, ET AL., DEFENDANTS

Aug. 7, 2001

AFFIDAVIT OF JOHN YELLOW BIRD STEELE IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGEMENT

Comes now John Yellow Bird-Steele, affiant herein being first duty sworn hereby deposes and states:

1. That I was elected to the office of President, Oglala Sioux Tribe in November 2000 and sworn into such office December 2000.

2. That I served two other terms of office as the President of the Oglala Sioux Tribe from 1992-1994 and 1996-1998.

3. I served as Oglala Sioux Tribe Vice-President from 1984-1986.

4. That I served as the Wounded Knee District Representative to the Oglala Sioux Tribal Council For 2 terms 1978-1982.

5. That I served on the Wounded Knee District School Board for seven years.

6. That I served 4 years on the Oglala Lakota College Board of Regents.

7. That I have personal knowledge of the matters that follow and I am available to testify to such matters in court.

8. That I have read the affidavit of John O. Donham dated February 11, 2000 and I am familiar with the matters set forth therein.

9. During my terms of office as a member of the Oglala Sioux Tribal Council and as Vice-President and President of the Oglala Sioux Tribe, the BIA has consistently failed or refused to pay to the Oglala Sioux Tribe and Oglala Sioux Tribe chartered entities the full indirect costs the Oglala Sioux Tribal Council and the Chartered entities are entitled to receive.

10. As a result of the failure of the BIA to pay to the Tribe the full indirect cost entitlement the Oglala Sioux Tribe was required to pay such Indirect Cost shortfalls from the Oglala Sioux Tribe General Fund.

11. The Oglala Sioux Tribe General fund is the only Oglala Sioux Tribe Discretionary fund available to the Oglala Sioux Tribal Council for expenditure to meet the needs of Oglala Sioux Tribal members who reside in Shannon County, the county that until the 2000 census was consistently labeled the poorest county in the nation. It is now ranked number two.

12. That the failure of the BIA to pay the OST 100% of the agreed upon Indirect Cost funds has resulted in the Oglala Sioux Tribal Council paying for such Indirect Cost shortfalls with Oglala Sioux Tribe General Fund dollars, bank loans, and/or direct program dollars resulting in a reduction of services to members of the Oglala Sioux Tribe.

13. That the Oglala Sioux Tribe in most cases must pay for the shortfalls in recovery of indirect costs from the General Fund, bank loans, or taking direct program dollars all of which result in less services to the target populations. All of these practices result in a reduction of program services, if the Federal Government had continued to operate the program there would be no reduction of services, Also the failure of the government to pay the full indirect costs result in a reduction of the level of program management. Such reductions in efficient management may r jeopardize the Oglala Sioux Tribes Fiscal Accounts Office certified accounting system.

14. The consistent failure of the BIA to pay the Indirect Cost Shortfalls has created a fiscal crisis. For example, the Oglala Sioux Tribe Department of Public Safety and the Oglala Sioux Tribe were recently threatened with repossession of all GSA vehicles due to the failure to pay a $300,000 bill. Also the Department of Public Safety is indebted to the Oglala Sioux Tribe for loans made to meet the Indirect Cost expenditures. Failure to collect such Indirect Cost has resulted in a reduction of

monthly payments to the nine political division of the Oglala Sioux Tribe.

15. The failure of the Oglala Sioux Tribe to make the monthly district allocation resulted in a take over and occupation of the Red Cloud Building. The main Oglala Sioux Tribe Administration building in mid January 2000. The building is still occupied by the Oyate (people). During the occupation Oglala Sioux Tribal records were destroyed, all computers were tampered with and subsequently shutdown. The building is still occupied and the results of the take over are still being felt by the tribal administration. Again, the failure of the Bureau of Indian Affairs to pay such Indirect Cost is partly attributable for the occupation.

16. The ability of the Oglala Sioux Tribal Council and its officers to effectively administer government has been severely compromised. The financial crises faced every pay period is caused in part by the Indirect Cost shortfall. Competition for Oglala Sioux Tribe services and employment result in political fighting that further limits the effective administration of the Oglala Sioux Tribal government.

17. The Bureau of Indian Affairs Indirect Cost shortfalls place a further strain upon the Oglala Sioux Tribe General Fund resulting in a decrease in funds available for Oglala Sioux Tribal services.

Dated this 31st day of July, 2001

/s/ JOHN YELLOW BIRD STEELE
John Yellow Bird Steele
President
Oglala Sioux Tribe

* * * * *

OGLALA SIOUX TRIBE
P.L. 93-638 Contracts

1. Attorney Generals Office
2. Burial Assistance Program
3. Court of Appeals (Supreme Court)
4. Credit and Finance Program
5. Custodial Services
6. Emergency Youth Shelter
7. Employment Assistance/Direct Employment
8. Education Monitoring & Evaluation (Aid to Tribal Government)
9. Enrollment Department (Aid to Tribal Government)
10. Higher Education Scholarship Program
11. Home Improvement Program
12. Johnson O' Malley Program
13. Natural Resources Regulatory Agency
14. ONTRAC-Indian Child Welfare Act Program
15. Public Relations Coordinators Office (Aid to Tribal Government)
16. Safety of Dams Operation & Maintenance
17. Special Education Services
18. Transportation Planning Office
19. Tribal Court
20. Tribal Work Experience Program

21. Water Resources Program
22. Youth Work Learn - (Aid to Tribal Gov't.)

[STAMPED RECEIVED SEP 17 1998 Pine Ridge Agency]

INDIAN SELF-DETERMINATION AGREEMENT

TO CONSOLIDATE CONTRACT NOS.

CTM75T72201	REAL ESTATE SERVICES
CTM75T72202	AGRICULTURE
CTM75T72203	LAW ENFORCEMENT
CTM75T72204	AID TO TRIBAL GOVERNMENT
CTM75T72206	FACILITIES MANAGEMENT
CTM75T72207	WATER RIGHTS

AND FOR OTHER PURPOSES.

BY AND BETWEEN

THE RAMAH NAVAJO CHAPTER
AND THE
UNITED STATES OF AMERICA
DEPARTMENT OF INTERIOR
BUREAU OF INDIAN AFFAIRS

Pursuant To
25 U.S.C. 450 et seq.
(PL 93-638 As Amended)

EFFECTIVE: JAN. 01, 1997

SECTION 1: AGREEMENT BETWEEN THE SECRETARY AND THE RAMAH NAVAJO CHAPTER.

(a) AUTHORITY AND PURPOSE.—

(1) AUTHORITY.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of the Interior (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S. C. 450 et seq.) and by the authority of the Ramah Navajo Chapter (referred to in this agreement as the "Contractor"). The provisions of the title I of the Indian Self-Determination and Education Assistance Act (25 U.S. C. 450 et seq.) are incorporated in this agreement.

(2) PURPOSE.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

This is a Title I Self-Determination Model Contract which contains the following programs:

A. **Aid to Tribal Government Program: including—Peace Making**

B. **Law Enforcement Program including Criminal Investigations**

C. **Natural Resources: including—Agricultural Extension Program**

D. **Real Estate Services: including Lease Compliance and Probate Services**

E. **Facilities Management: including—Land Lease and Maintenance Improvement & Repairs**

F. **Water rights**

G. **RESERVED—Direct Contract Support Services**

H. **Indirect Contract Support Costs**

(3) **INCORPORATION BY REFERENCES.**—This Contract hereby incorporates by reference all applicable provisions of the model agreement described in section 108(c) of the Indian Self-Determination and Education Assistance Act (25 U.S. C. 450 et seq.), as if fully set forth herein, except as those provisions may be amended or more specifically stated in this agreement.

(4) **PRIOR MODIFICATIONS.**—All provisions of Contract Nos. CTM75T72201, CTM75T72202, CTM75T72203, CTM75T72204, CTM75T72206 and CTM75T72207: and all provisions of modifications thereto, (other than the award of prior funding

amounts), are hereby repealed and superseded by the provisions of this contract.

(b) **TERMS, PROVISIONS, AND CONDITIONS.**—

(1) **TERM.**—Pursuant to section 105(c) (1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c) (1)), the term of this contract shall be for an indefinite period of time, reflective of the contract's **"Mature Status in accordance with Section 4(h) of the Act.** Pursuant to section 105 (d)(1) of such Act (25 U.S.C. 450j (d)), this Contract shall be funded on the basis of a calendar year, unless the Secretary and the Contractor agrees on a different period in the annual funding agreement incorporated by reference in subsection (f) (2).

(2) **EFFECTIVE DATE.**—on January 01, 1997.

(3) **PROGRAM STANDARD.**—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards identified in 25 CFR and in the absence of standard identified there, then in accordance with Ramah Navajo Tribal Program Standards:

A. **Aid to Tribal Government Program Including Peace Making - Tribal Program Standards**

B. **Law Enforcement Program Standards - 25 CFR Part 11, 12 Including Criminal Investigations**

C. **Natural Resources - 25 CFR Including Agricultural Extension**

D. **Realty - 25 CFR Parts 15, 150-152, 162, 169, 261-162**

F. Facilities Management - 25 CFR

G. Water Rights

(4) **FUNDING AMOUNT.**—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

(5) **LIMITATION OF COSTS.**—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

(6) **PAYMENT.**—

(A) **IN GENERAL.**—Payments to the Contractor under this Contract shall—

(i) be made as expeditiously as practicable; and

(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

(B) LUMP-SUM, AND METHODS OF PAYMENT.—

Lump-Sum payments shall he made to the Contractor.

i) IN GENERAL.—Pursuant to section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, the total amount provided for in the annual funding agreement for that fiscal year, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 90-0957 LH/WWD ACE

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE, AND PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY, UNITED STATES DEPARTMENT OF INTERIOR, NEIL MCCALEB, ASSISTANT SECRETARY OF INTERIOR FOR INDIAN AFFAIRS, IN HIS OFFICIAL CAPACITY, EARL DEVANEY, INSPECTOR GENERAL, IN HIS OFFICIAL CAPACITY, AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed: June 6, 2002]

AFFIDAVIT OF MICHAEL P. GROSS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The undersigned, being first duly sworn, hereby deposes and states:

1. I am class counsel for Plaintiffs in the above styled matter.

2. As a supplement to my previous affidavit in support of Plaintiffs' Amended Motion for Partial Summary Judgment filed August 8, 2001 [Docket No. 570], I wish to add the attached work papers sent to me by the General Accounting Office (GAO) in June 20, 2001, in response to a Freedom of Information Act Request I had submitted.

3. The attached GAO work papers, cover sheet and, pages 2, 3 and 4, [Exhibit 1 to this affidavit] serve as background to the statements made by GAO on page 35 of its June 1999 Report to Congress on Shortfalls in Indian Contract Support Costs, GAO/RCED-99-150. The GAO Report is attached as Deposition Exhibit 5 to the deposition of James Thomas, previously filed.

MORE AFFIANT SAYETH NAUGHT.

/s/ MICHAEL P. GROSS
MICHAEL P. GROSS

* * * * *

For more of a discussion on this point see **work paper DF1-4, page 4.** The contract support need information in the table is from **work paper DF1-4, page 9-Column F.)**

Fiscal Year	BIA's Budget Request for Contract Support Costs	Work Paper Reference for BIA's Request	Contract Support Costs Need
1989	$45,866,000	DJ1-13, pages 1 and 12	$55,275,408
1990	$48,946,000	DJ1-14, pages 1 and 13	$69,363,909
1991	$43,946,000	DJ1-15, pages 1 and 18	$64,034,388
1992	$55,000,000	DJ1-16, pages 1 and 17	$66,320,015
1993	$56,282,000	DJ1-17, pages 1 and 15	$85,189,101
1994	$83,808,000	DJ1-18, pages 1 and 13	$92,981,077
1995	$95,823,000	DJ1-19, pages 1 and 15	$110,867,852
1996	$116,626,000= $109,626,000 + $7,000,000 (ISD)	DJ1-20, pages 1 and 20, +pages 23-24 (ISD)	$108,952,886

1997	$115,608,000= $110,608,000 +$5,000,000 (ISD)	DJ1-21, pages 1 and 19, + page 25 (ISD)	$122,033,561
1998	$110,829,000= $105,829,000 + $5,000,000 (ISD)	DJ1-22, pages 1 and 19, + pages 28-29 (ISD)	$136,251,935

The table shows that BIA never requested enough to fully cover the costs of tribal contract support needs associated with BIA programs (except for the anomaly in 1996). BIA took an unexpected significant budget cut in 1996. **Work paper DH2-11, page 44,** shows that BIA's appropriations of $1.730 billion for 1995 was cut to $1.588 billion for 1996 (over an 8 percent overall reduction—$142,558,000 million). The main account for tribal contracting—Tribal Priority Allocations (TPA)—was reduced by about $92,136,000. The "low" contract support needs figure for 1996 is due to the budget cuts. The needs are calculated by multiplying the BIA base program amount by a tribe's indirect cost rate. If the base amount is reduced then, all else being equal, the needs for contract support costs from BIA will also be reduced. Had it not been for the severe budget cuts in 1996, BIA's request for contract support costs would not have more than the final need.

This same budget request information is summarized in **work paper DR1-6 (The Red Book), page 48.**

(2) Reasons Why BIA Has Not Requested Full Funding.

Determining the need for contract support costs is a very dynamic process. BIA pays only two categories of contract support costs—indirect costs and start-up costs. All start-up costs and indirect costs on new and expanded contracts are paid out of BIA's Indian Self-Determination (ISD) Fund. Since 1995, when BIA's Indian Self-Determination Fund was created, BIA has had enough funds, and more, to fully the contract support costs for new and expanded contracts (**see work papers BIA5-1 and BIA5-2**). BIA's main fund for contract support costs is used exclusively to pay indirect costs on ongoing and existing contracts.

Indirect costs, which are determined by multiplying the direct cost base for BIA programs by an indirect cost rate, are very difficult to predict. Two years in advance, when BIA's budget request is prepared, BIA does not know what the direct cost base will be (i.e., tribal contracting levels) or what the tribes' indirect cost rate will be. **Work papers BIA1-7, page 4 and DR1-1, page 7** state the problems with forecasting contracting levels and indirect cost rates. The main factor influencing contracting levels is the amount of funding appropriated for BIA programs. As discussed above for 1996, the deep budget cuts resulted in less dollars contracted by the tribes, which in turn led to lower contract support needs for BIA programs.

Indirect cost rates are calculated by dividing the indirect cost pool by the direct cost base. The direct cost base for BIA programs will depend on future appropriation levels and which programs the tribes decide to contract. The indirect cost pool represents the tribes indirect costs

associated with managing its programs. A tribe indirect cost rate will vary depending on changes in the indirect cost pool and changes in the direct cost base. Therefore, the uncertainty of (1) future appropriation levels, (2) tribal contracting levels, and (3) tribal indirect cost pools make it difficult for BIA to predict contract support needs. (Also see a recent statement by Kevin Gover, Assistant Secretary for Indian Affairs, on the difficulties in projecting these needs in **work paper DH1-3, page 1.**)

In addition to the inherent difficulty in predicting contract support needs, BIA has other competing priorities. For the last several years, BIA's budget requests for contract support costs have been less than its own forecasts of the future contract support needs. For example, BIA's fiscal year 1998 budget justification showed an anticipated need of $111,547,000 yet the request was only for $105,829,000 (**work paper DJ1-22, page 24**). That document also shows the shortfalls for 1996 and the projected shortfall for 1997. The request for 1998 was not even enough to fully fund the need from 1997. This same pattern exists in the budget justifications for fiscal years 1999 (**work paper DJ1-23, page 29**) and 2000 (**work paper DJ1-24, page 27**). Those budget justifications also show that BIA requested less than the projected need. They also show that BIA's projected need is always underestimated. So, the actual shortfalls are much more than projected.

BIA has not been requesting full funding for contract support costs because of other program priorities. Two of BIA's high priority programs are law enforcement and education. The budget justifications for fiscal years 1998 through 2000 contain statements about these priorities (**see work papers DJ1-22, page 11, DJ1-23, pages 18-19, and**

DJ1-24, pages 15-18). Also see BIA's press release on the fiscal year 2000 budget request (work paper DF5-2) and statements made at a Congressional hearing in work paper DH2-2, pages 13-16.

FAILURE TO REQUEST CONTRACT SUPPORT APPROPRIATIONS

COMPILATION FROM BUDGET JUSTIFICATIONS ATTACHMENT C (FEBRUARY 23, 2000) EXHIBIT 7 (JULY 20, 2005)

YEAR[1]	DOI ESTIMATE OF "NEED"[2]	REQUEST	"ACTUAL NEED"[3]	APPROPRIATED (% SHORTFALL)[4]
1996		109,626	104,526	90,829 (87%)
1997	107,695	110,608	117,346	90,829 (77%)
1998	111,547 [126,265]	105,829	131,714	105,829 (80%)
1999	128,265 [138,914]	114,917	130,299	114,991 (88%)

[1] 1994 & 1995 omitted because of different format in the Budget Justifications.

[2] The first figure is BIA's estimate of CSC need two years prior to year of appropriation. In brackets is the revised estimate one year before year of appropriation.

[3] This is the total § 450j-1(g) contractual amount.

[4] This column shows the amounts appropriated and the percentage shortfalls between "actual need" and appropriations. No request for deficiency appropriations was made during the years 1995 and the present.

2000	134,047 [144,824]	121,338	136,139	120,229 (88%)
2001	140,540 [145,638]	128,732	140,991	125, 209 (88%)
2002	142,991 [146,800]	130,209	141,372	130,811 (92%)
2003	142,000 [144,492]	133,209	147,521	132,343 (89%)
2004	145,000 [151,021]	135,315		
2005	152,521	133,314		

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 90-0957 LH/KBM ACE

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE, AND PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, ET AL., DEFENDANTS

Filed: Sept. 26, 2005

DECLARATION OF BENJAMIN H. NUVAMSA

Benjamin H. Nuvamsa, pursuant to 28 U.S.C. § 1746, declares and states as follows:

1. I am over 18 years of age, am of sound mind, and have personal knowledge of the information in this declaration. I live in Pinetop, Arizona.

2. I have worked on a number of projects in the Bureau of Indian Affairs (Bureau) related to Pub. L. 93-638, the Indian Self-Determination & Education Assistance Act, as amended, including serving as Lead Negotiator for the Bureau in developing and implementing regulations for the 1988 Technical Amendments to the Act during the years 1989 to 1990.

3. I also represented the Bureau on the National Congress of American Indians' National Policy Work group on Contract Support Costs during the years approximating 1995 through 2000. A Final Report was published by the National Congress of American Indians in July, 1999 after years of study and evaluation of contract support costs in the Bureau and Indian Health Service.

4. During this period I also served as Co-Chair on a BIA/Tribal Work Group on Contract Support Costs (as part of a larger BIA/Tribal Priority Allocation Work Group) and was the primary author of a report entitled "A Study of Contract Support Costs in the Bureau of Indian Affairs and Recommendations for Reform" completed in June 1999. During this period, I also collaborated with the General Accounting Office (now the Government Accountability Office) researchers in a study of contract support costs in the Bureau and Indian Health Service; and from which a report to Congress was produced.

5. The Act, in Section 106(c), requires the Secretary to report, not later than May 15th of each year, the annual report on the implementation of the Act, to include an accounting of total amounts of funds provided for each program including direct program costs and contract support costs. However, during our study (approximately the late 1990's) we were unable to locate a current report in the files of the Bureau. In fact, the condition of the files containing the budgets, including contract support costs data, were such that it was difficult to ascertain the chronology and accuracy of the data. I recall the most

recent comprehensive report dated around 1996 to 1997.

6. During the course of my employment with the Bureau, I observed the Bureau's annual budget request for Indirect Contract Support Costs in the President's annual budget request, has been less than the amount needed by Indian tribes, particularly since Fiscal Year 1994 and forward.

7. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

Executed this 26th day of Sept., 2005.

/s/ BENJAMIN H. NUVAMSA
BENJAMIN H. NUVAMSA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV No. 90-0957 LH/WWD ACE

RAMAH NAVAJO CHAPTER, OGLALA SIOUX TRIBE AND PUEBLO OF ZUNI, FOR THEMSELVES AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL., DEFENDANTS

Filed: Aug. 31, 2006

ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion for Leave to File and Have Considered a Newly Discovered Party Admission (Docket No. 1013). The Court, having considered the motion as well as the briefs filed in support and in opposition to it, concludes that it shall be **granted.**

In this motion, Plaintiffs seek for the Court to admit and consider an "admission" made by counsel for the United States Department of Justice in a brief filed in *Southern Ute Indian Tribe v. Michael O. Leavitt, et al.*, Civ. No. 05-CV-0988 WPJ/LAM. Plaintiffs contend that this admission supports their interpretation to the effect

that the ISDA and its model contracts create enforceable obligations of the United States for payment of contract support costs ("CSC") in amounts in excess of "capped" CSC appropriations. This alleged "admission" was set out in Plaintiffs' memorandum in support of their motion (Docket No. 1014), and the Court has duly considered it, along with the many other materials that have been submitted by both parties, relating to the pending cross-motions for summary judgment.

WHEREFORE, Plaintiffs' Motion for Leave to File and Have Considered a Newly Discovered Party Admission is hereby **granted.**

IT IS SO ORDERED.

/s/ LEROY HANSEN
SENIOR UNITED STATES
DISTRICT JUDGE

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
FEB 17 2012
OFFICE OF THE CLERK

No. 11-551

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the government is required to pay all of the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, where Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap.

PARTIES TO THE PROCEEDING

Petitioners are Kenneth L. Salazar, Secretary of the Interior; Larry Echo Hawk, Assistant Secretary—Indian Affairs, Department of the Interior; Mary L. Kendall, Acting Inspector General, Department of the Interior; and the United States of America.

Respondents are Ramah Navajo Chapter, the Oglala Sioux Tribe, and the Pueblo of Zuni, as representatives of a certified class of Indian tribes and tribal organizations that have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

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In the Supreme Court of the United States

No. 11-551

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 644 F.3d 1054. The opinion of the district court (Pet. App. 90a-107a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2011. A petition for rehearing was denied on August 1, 2011 (Pet. App. 108a-109a). On October 21, 2011, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 14, 2011, and the petition was filed on October 31, 2011. The petition was granted on January 6, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

The Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A), provides, in pertinent part:

> An officer or employee of the United States Government * * * may not * * * make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

Section 450j-1(b) of Title 25 provides, in pertinent part:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

Additional pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-33a.

STATEMENT

I. STATUTORY BACKGROUND

A. General Provisions Of The ISDA

Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administra-

tion" of federal programs and services for Indians. 25 U.S.C. 450a(b). Before the ISDA, most federal programs and services for Indians, such as health and educational services, were administered directly by the federal government. See S. Rep. No. 274, 100th Cong., 1st Sess. 2-3 (1987). The ISDA permits tribal organizations to administer such federal programs and services themselves. Under the Act, at the request of an Indian tribe, a tribal organization may enter into a "self-determination contract[]" with the Secretary of the Interior or the Secretary of Health and Human Services, as appropriate, to assume operation of federally funded programs and services that the Secretary would otherwise have provided directly.[1] 25 U.S.C. 450f(a). The Secretary must accept a tribe's request for an ISDA contract except in specified circumstances. See 25 U.S.C. 450f(a)(1) ("The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts[.]"); 25 U.S.C. 450f(a)(2)(A)-(E) (permitted grounds for declination). The Act thus generally permits an Indian tribe, at its initiative, to step into the shoes of a federal agency and administer federally funded services.

The basic parameters of an ISDA self-determination contract are set out in the Act.[2] See generally 25 U.S.C. 450*l*(c) (model agreement). As originally enacted in 1975, the ISDA required the Secretary to give the tribe the

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[1] The Act defines the term "tribal organization" to include, *inter alia*, the governing body of an Indian tribe or any organization controlled or chartered by the tribe. See 25 U.S.C. 450b(*l*).

[2] In addition to self-determination contracts, the ISDA also authorizes self-governance "funding agreements" and self-governance "compacts." See 25 U.S.C. 458aa *et seq.* and 458aaa *et seq.* The differences among these schemes are not relevant here.

amount of funding that the "Secretary would have otherwise provided for the operation of the programs" during the fiscal year in question. 25 U.S.C. 450j-1(a)(1). This amount is sometimes called the "secretarial amount." In 1988, Congress amended the ISDA to require that, in addition to the secretarial amount, the Secretary must also provide an amount for the tribe's reasonable "contract support costs"—*i.e.*, expenses that a tribe must incur to operate a federal program but that the Secretary would not incur. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)). Costs that are eligible for federal funding as "contract support costs" include certain direct costs of administering a program, such as costs of complying with special audit and reporting requirements, and certain indirect costs, such as an allocable share of general overhead expenses not already covered by the secretarial amount. See 25 U.S.C. 450j-1(a)(3)(A). Because contract support costs may vary from year to year, the sums to be provided are negotiated on an annual basis and memorialized in annual funding agreements. See 25 U.S.C. 450j(c)(2); 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (f)(2)).

B. ISDA Contracts And Federal Appropriations

Federal funding under ISDA contracts, like funding for other federal programs, is contingent upon the availability of appropriations. Congress made that contingency explicit in at least four places in the Act. First, the ISDA declares as a general matter that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c)(1). The Secretary's authority to obligate federal funds under ISDA contracts

is thus expressly made subject to Congress's annual funding decisions. Second, Congress directed that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard terms. 25 U.S.C. 450*l*(a)(1). Those terms specify that a lack of sufficient appropriations may excuse performance by either party. See 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4), (5), and (c)(3)). Third, the Act requires the Secretary to submit annual reports to Congress describing, *inter alia*, "any deficiency in funds needed to provide required contract support costs to all contractors." 25 U.S.C. 450j-1(c).

Finally, in a provision entitled "Reductions and increases in amount of funds provided," Congress specified:

> Notwithstanding any other provision in this [Act], the provision of funds under this [Act] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act].

25 U.S.C. 450j-1(b). The ISDA thus expressly contemplates that the appropriations provided by Congress may be insufficient to fund the requests of all tribal contractors fully or equally.

C. This Court's Decision In *Cherokee Nation* v. *Leavitt*

In *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), the Indian Health Service (IHS), an agency of the Department of Health and Human Services, paid only a portion of the contract support costs it had promised to two tribes in ISDA contracts for fiscal years 1994 through 1997. The tribal contractors brought suit to recover the balance. Citing a lack of available appropria-

tions, the government argued that it had no further contractual obligation to the tribes because the Secretary had spent the remaining funds for other purposes, including to support important federal administrative functions. *Id.* at 641-642.

This Court rejected that argument and held that the Secretary could properly be held liable for the promised but unpaid amounts. See *Cherokee*, 543 U.S. at 636-647. Noting that the IHS did "not deny that it promised to pay the relevant contract support costs," *id.* at 636, this Court agreed with the tribes that the government "normally cannot back out" of an otherwise valid contract on the basis of insufficient appropriations "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue." *Id.* at 637. The appropriations acts for the fiscal years in question, the Court emphasized, "contained no relevant statutory restriction," *ibid.*, and the agency had access to "*other* unrestricted funds, small in amount but sufficient to pay the claims at issue" for the particular tribes before the Court, *id.* at 641. Consequently, the ISDA's proviso that all funding under self-determination contracts is "subject to the availability of appropriations," 25 U.S.C. 450j-1(b), could not excuse the government's breach: "Since Congress appropriated adequate unrestricted funds here," that contingency was irrelevant. *Cherokee*, 543 U.S. at 643.

II. THE BUREAU OF INDIAN AFFAIRS AND ITS ANNUAL APPROPRIATIONS

A. The Bureau Of Indian Affairs And The ISDA

The Secretary of the Interior, through the Bureau of Indian Affairs (BIA), provides a broad range of educational, social, public safety, and economic programs and services to more than 2.2 million Native Americans and Alaska Natives. Almost 40% of the BIA's annual funding for such services is administered directly by tribes and tribal organizations under ISDA contracts. Nearly all of the more than 565 federally recognized Indian tribes have at least one such contract with the Secretary.

The Secretary funds ISDA self-determination contracts, like other BIA programs, from the appropriations provided by Congress each year. Until fiscal year (FY) 1994, the relevant appropriations acts simply provided a lump sum for the operation of Indian programs, including for funding ISDA self-determination contracts. Although the accompanying congressional committee reports designated specific amounts for contract support costs, see, *e.g.*, H.R. Conf. Rep. No. 901, 102d Cong., 2d Sess. 40 (1992), the appropriation acts themselves contained no relevant restrictions, see, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, 106 Stat. 1374. Compare *Cherokee*, 543 U.S. at 637 (noting that the IHS appropriations for the fiscal years there at issue likewise "contained no relevant statutory restriction").

B. Statutory Appropriations Caps On The BIA's Funding For Contract Support Costs

In FY 1994, however, Congress for the first time imposed a statutory cap on the appropriations available to the Secretary to pay contract support costs under the

ISDA. Of a total appropriation in that fiscal year of approximately $1.5 billion for the BIA, Congress specified that "*not to exceed $91,223,000* of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts" under the ISDA.[3] Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1390-1391 (emphasis added). The Conference Report accompanying the bill explained:

> The managers remain very concerned about the continued growth in contract support costs, and caution that it is unlikely that large increases for this activity will be available in future years' budgets. It is also a concern that significant increases in contract support [costs] will make future increases in tribal programs difficult to achieve.

H.R. Conf. Rep. No. 299, 103d Cong., 1st Sess. 28 (1993).

In each fiscal year since FY 1994, Congress has imposed a similar "not to exceed" cap on the appropriations available to the Secretary to pay ISDA contract support costs. See Pub. L. No. 103-332, 108 Stat. 2511 (FY 1995); Pub. L. No. 104-134, 110 Stat. 1321-170 (FY 1996); Pub. L. No. 104–208, 110 Stat. 3009-192 (FY 1997); Pub. L. No. 105-83, 111 Stat. 1554 (FY 1998); Pub. L. No. 105-277, 112 Stat. 2681–245 (FY 1999); Pub. L. No. 106–113, 113 Stat. 1501A–148 (FY 2000); Pub. L. No. 106–291, 114 Stat. 934 (FY 2001); Pub. L. No. 107-63, 115 Stat. 430 (FY 2002); Pub. L. No. 108-7, 117 Stat. 231 (FY 2003); Pub. L. No. 108-108, 117 Stat. 1256-1257 (FY

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[3] Subsequent appropriations acts have used the phrase "contract support costs," which includes both direct and indirect contract support costs. See Pet. App. 6a, 8a.

2004); Pub. L. No. 108-447, 118 Stat. 3055 (FY 2005); Pub. L. No. 109-54, 119 Stat. 513-514 (FY 2006); Pub. L. No. 110-5, 121 Stat. 8-9, 27 (FY 2007) (continuing resolution); Pub. L. No. 110-161, 121 Stat. 2110 (FY 2008); Pub. L. No. 111-8, 123 Stat. 713-714 (FY 2009); Pub. L. No. 111-88, 123 Stat. 2916 (FY 2010); Pub. L. No. 112-10, 125 Stat. 151 (FY 2011) (continuing resolution).[4] The relevant portion of each of these appropriations acts is reproduced in the appendix to this brief. App., *infra*, 21a-33a.

Since FY 1999, moreover, Congress has provided in each of the relevant appropriations acts that the statutory cap on contract support cost funding applies "notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended." See, *e.g.*, Pub. L. No. 105-277, 112 Stat. 2681-245. And Congress has included a separate provision in each appropriations act for the BIA since FY 1999 reaffirming that the capped sums provided in previous years' appropriations represented "the total amounts available" for contract support costs in those years. See, *e.g.*, § 314, 112 Stat. 2681-288.

It is undisputed that these statutory appropriations caps have restricted the available funds at a level "well below the sum total" that would be required for the BIA to satisfy all tribal contractors' requests for contract support costs. Pet. App. 2a. As the district court found, in each year since FY 1994, the "BIA has distributed to

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[4] Similarly, Congress has imposed statutory caps on contract support cost funding for IHS programs in every fiscal year since FY 1998 (*i.e.*, after the contract years at issue in *Cherokee*). See generally *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) (holding that the government is not liable for contract support costs in excess of the statutory appropriations caps), petition for cert. pending, No. 11-83 (filed July 18, 2011).

tribal contractors the full amount of [contract support cost] funding appropriated for that purpose." *Id.* at 98a. And in each of those years, contractors' total requests for contract support costs "have exceeded the amount of appropriated funds that Congress set aside." *Ibid.*

C. The BIA's Distribution Of Available Appropriations

The BIA responded to the appropriations caps by establishing a system for distributing the available funding among tribal contractors on a "uniform, pro-rata basis," according to notices published annually in the *Federal Register*. Pet. App. 9a (collecting citations); see, *e.g.*, *Distribution of Fiscal Year 1994 Contract Support Funds*, 58 Fed. Reg. 68,694 (Dec. 28, 1993). In the committee reports accompanying Interior's FY 1995 appropriation, the House and Senate both indicated approval of this approach. See H.R. Rep. No. 551, 103d Cong., 2d Sess. 56 (1994) (urging the BIA to "ensure that each [tribe] receives a proportionate share of their fiscal year 1995 contract support costs"); S. Rep. No. 294, 103d Cong., 2d Sess. 57 (1994) (similar). The D.C. Circuit subsequently held that the Secretary was required to allocate the available funding for contract support costs equitably among tribal contractors. *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1347-1349 (1996).

The BIA has therefore adhered to an express policy of distributing the limited appropriations provided by Congress among contractors in an equitable fashion. For most of the period at issue in this case, the BIA employed the pro-rata distribution methodology described by the court of appeals. Pet. App. 9a. Under that methodology, in fiscal years 1994 through 2004, tribal organizations contracting with the BIA were paid between 77%

and 93% of their requested contract support costs. See *id.* at 10a.

In 2006, the BIA adopted a revised national policy for the equitable distribution of funding for contract support costs. See U.S. Dep't of the Interior, Bureau of Indian Affairs, National Policy Memorandum, Contract Support Cost, NPM-SELFD-1 (May 8, 2006) (2006 Policy).[5] The new policy, which was developed with the "active participation of representatives of Indian tribes," *id.* at 3, responds to tribal concerns by seeking to ensure that each tribal contractor receives, as soon as possible in each fiscal year, at least the amount of funding for contract support costs that it received in the previous year, plus a proportionate share of any additional funding provided by Congress. See *id.* at 13-17. The policy also describes in detail how the BIA determines the amount of contract support costs that a tribal contractor "is eligible to receive[,] subject to available appropriations." *Id.* at 8.

The BIA continues to work with Indian tribes to develop the agency's budget priorities in light of the annual appropriations limits on ISDA contract support costs. Each year, for example, as required by the ISDA and consistent with the Executive Branch's policy of consulting with tribal governments on matters having tribal implications, the BIA develops its annual budget requests—including any requests for additional contract support cost funding—in consultation with tribes. See 25 U.S.C. 450j-1(i); see also Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). In addition, the BIA maintains a joint working group "comprised of Federal and Tribal individuals who possess knowledge of [contract

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[5] Available at http://www.bia.gov/idc/groups/public/documents/text/idc-000691.pdf

support cost] issues" and who are tasked with "provid[ing] advice and guidance to the BIA" on matters concerning ISDA contract support costs. 2006 Policy 4.

III. THE PRESENT CONTROVERSY

A. Background

Respondent Ramah Navajo Chapter is a tribal organization of the Navajo Nation, a federally recognized Indian tribe. J.A. 48. Respondent entered into multiple ISDA self-determination contracts with the BIA in the 1980s for the administration of federally funded law enforcement, water rights, and other programs. See *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1458 (10th Cir. 1997). Consistent with the requirements of the ISDA, each of respondent's contracts and the annual funding agreements thereunder specified that all funding was subject to the availability of appropriations. See, *e.g.*, J.A. 206.

In 1990, respondent filed this class action to challenge the methodology that Interior's Office of the Inspector General used to set indirect cost rates— *i.e.*, the rates that are often used in ISDA funding negotiations as a starting point for determining indirect contract support costs. *Ramah Navajo Chapter*, 112 F.3d at 1459; see Pet. App. 6a; J.A. 48-56. In 1993, the district court certified a nationwide class composed of "those Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act." J.A. 66-67.[6] The parties

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[6] The district court certified the class over the government's objection that most of the unnamed plaintiff class members have not exhausted their claims under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.* The district court ruled that "it is not necessary that each member of the proposed class exhaust its administrative reme-

eventually settled respondents' claims concerning the indirect-cost rate formula, see Pet. App. 13a, and those claims are not at issue here.

In 1999, however, the district court granted respondents leave to amend their complaint to add a new class claim for the alleged underpayment of contract support costs due to the statutory appropriations caps. J.A. 68.[7] In their amended complaint, respondents acknowledged that Congress had imposed statutory "not to exceed" caps on the appropriations available to the Secretary to pay contract support costs, see *id.* at 71-72, but they nonetheless asserted that the Secretary's refusal to "pay more than the 'not to exceed' level" of funding constituted a breach of contract, *id.* at 73. The parties cross-moved for summary judgment, and the matter was stayed pending the outcome of the *Cherokee* litigation. See Pet. App. 13a-14a.

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dies." J.A. 64. That ruling was mistaken. See *Arctic Slope Native Ass'n* v. *Sebelius*, 583 F.3d 785, 795 (Fed. Cir. 2009) ("[A]n ISDA claimant that has not presented its claim to a contracting officer pursuant to the CDA cannot be a class member in an ISDA class action."), cert. denied, 130 S. Ct. 3505 (2010). Because many class members have not exhausted their administrative remedies, moreover, their claims are likely time-barred. See *id.* at 795-797 (concluding that the class-action tolling doctrine is inapplicable to CDA claimants who have not exhausted administrative remedies); *Menominee Indian Tribe* v. *United States*, 614 F.3d 519, 528 (D.C. Cir. 2010) (same). Neither the propriety of the class certification nor the timeliness of the unexhausted claims of unnamed class members, however, is before this Court.

[7] The district court also granted the motion of respondent Oglala Sioux Tribe to intervene as a class representative. J.A. 69; see *id.* at 75 (Oglala Sioux complaint). The district court subsequently granted respondent Pueblo of Zuni leave to intervene as well. J.A. 139.

B. The District Court's Decision

Following this Court's decision in *Cherokee*, the district court granted summary judgment for the government. Pet. App. 90a-107a. The court found no material dispute concerning three basic propositions: (i) Congress had imposed statutory appropriations caps on the BIA's funding for contract support costs; (ii) the BIA had distributed "the full amount" of the available appropriations to tribal contractors each year; and (iii) the appropriated and distributed sums were insufficient to satisfy all of the respondent class members' requests for contract support costs. *Id.* at 97a-98a.

The district court observed that the D.C. and Federal Circuits had already rejected tribal demands for ISDA contract support costs in excess of the statutory appropriations caps. See Pet. App. 98a-101a (discussing *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000), and *Ramah Navajo Sch. Bd.*, *supra*). Agreeing with those decisions, the district court ruled that the "ISDA and its model contracts do not create enforceable obligations of the United States for payment of contract support costs in amounts in excess of capped contract support cost appropriations." *Id.* at 106a.

The district court rejected respondents' contention that this Court's decision in *Cherokee* requires the government to pay contract support costs irrespective of appropriations limits. Pet. App. 102a-105a. In *Cherokee*, the court noted, the Court "made repeated reference to the lack of legally binding restrictions" in the relevant appropriations acts. *Id.* at 104a. "The obvious implication from the *Cherokee* [] case is that, where there are legal restrictions in the agency's appropriations, the 'subject to the availability of appropriations' language serves

to limit governmental liability under the contracts to the amount of those restricted funds." *Id.* at 105a.

Accordingly, the district court granted summary judgment in favor of the government. Pet. App. 106a. The court explained: "Congress has the authority to determine the amount of appropriated funds the agency may obligate under self-determination contracts, and it has exercised that authority by providing that the amounts of such contracts are 'subject to the availability of appropriations,' and by placing caps in the BIA's appropriations statutes." *Ibid.*

C. The Court Of Appeals' Decision

A divided panel of the court of appeals reversed. Pet. App. 1a-87a. The court of appeals did not dispute that Congress had imposed firm statutory limits on the relevant appropriations available to the Secretary for contract support costs. See *id.* at 7a-8a. The court acknowledged that the Secretary could not pay all of respondents' requests for such costs without exceeding the statutory caps. See *id.* at 2a, 44a-45a. And the court recognized that the phrase "subject to the availability of appropriations," which appears both in the ISDA and in all of the relevant contract documents, could be interpreted in the manner the government urged and the district court held, under which the total amount of BIA funding for contract support costs available for all tribal contractors is subject to the statutory cap. *Id.* at 16a.

Nevertheless, the court of appeals concluded that the government may be liable for amounts in excess of the statutory caps. Because Congress in each fiscal year appropriated sufficient funds to meet the needs of any *one* contractor considered in isolation, the court held, the government must pay *all* of the contract support costs

requested by *every* such tribal contractor—even though the necessary result is to exceed the statutory appropriations limits imposed by Congress. Pet. App. 29a-30a; see *id.* at 34a ("[T]he insufficiency of a multi-contract appropriation to pay all contracts does not relieve the government of liability if the appropriation is sufficient to cover an individual contract."). In the court's view, the sufficiency of the available appropriations for a particular contract must be determined by comparing that particular contract to the total sum appropriated by Congress, without reference to any other contract that the agency must satisfy from the same appropriated sum. *Id.* at 26a. To treat the capped appropriation as the total sum available for *all* ISDA contractors, the court believed, would require "an improper conflation of over 600 tribes and tribal contractors into one amalgamated contractor." *Id.* at 31a. Accordingly, the court rejected the reasoning of the Federal Circuit, which held in a similar case that the government is not liable to ISDA contractors for amounts in excess of the statutory appropriations caps. *Id.* at 34a-38a (discussing *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) (*Arctic Slope*), petition for cert. pending, No. 11-83 (filed July 18, 2011)).

The court of appeals found no "meaningful distinction" between this case and *Cherokee*, in which there were no statutory appropriations caps, because in both cases the funds "were similarly insufficient to cover all objects for which the appropriation was available." Pet. App. 29a n.8. The court reasoned that this Court's emphasis on the "unrestricted" nature of the appropriations acts at issue in *Cherokee* meant only that the there was no statutory restriction against paying "the individual contractors bringing suit" in that case. See *id.* at 30a.

The court of appeals rejected the government's reliance on the Appropriations Clause of the Constitution, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7, and the Anti-Deficiency Act, which provides that a federal officer or employee "may not * * * make or authorize an expenditure or obligation exceeding an amount available in an appropriation," 31 U.S.C. 1341(a)(1)(A). Pet. App. 43a-47a. The court acknowledged that the appropriations caps would prevent the Secretary himself from disbursing more than the appropriated sums. *Id.* at 44a-45a. In the court's view, however, tribal contractors could simply "recover[] from the Judgment Fund" any unpaid balance. *Id.* at 45a. Although the court recognized that "Congress likely did not intend" for contractors to avoid the statutory appropriations caps by seeking any excess from the Judgment Fund, it reasoned that "we must consider the legal effect of Congress' intentional acts, and those acts compel [this] result." *Ibid.* The court explained: "Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an on-going breach of the ISDA's promise." *Ibid.* The court concluded that, if Congress wished to limit payments from the Treasury for contract support costs, it was required either to amend the ISDA itself or to "limit appropriations on a contract-by-contract basis" for each of the hundreds of tribal contractors nationwide. *Id.* at 46a.

Judge Hartz dissented (Pet. App. 47a-87a), objecting that the majority had "render[ed] futile the spending cap imposed by Congress." *Id.* at 47a. There is no authority, the dissent maintained, for requiring the government to make payments in excess of a statutory appropriations

ceiling: "If such payments are not barred by the Constitution's Appropriations Clause, then the Anti-Deficiency Act should do the trick." *Id.* at 60a. Nor, the dissent continued, was the majority's result required by this Court's decision in *Cherokee*, because "what the Secretary sought *discretion* to do in *Cherokee*"—to allocate among tribal contractors an appropriated sum that was too small to cover the contract support costs requested by all contractors—"is *compelled* here" by the appropriations caps. *Id.* at 80a.

SUMMARY OF ARGUMENT

Each year for more than 15 years, Congress has imposed an explicit statutory ceiling on the appropriations available to the Secretary of the Interior to pay contract support costs under the Indian Self-Determination and Education Assistance Act. The Secretary has distributed to tribal contractors each year the entire sum appropriated by Congress, but the appropriated sums have never been sufficient to cover all tribal requests for contract support costs. In this nationwide class action, the court of appeals held that all of the respondent tribes and tribal contractors are entitled to recover all of their contract support costs from the Treasury, notwithstanding the appropriations caps imposed by Congress—and that if the Secretary cannot pay their claims, respondents are entitled to recover the difference from the Judgment Fund.

That conclusion is untenable. The United States is not liable, in contract or otherwise, for the Secretary's refusal to pay sums that Congress has not authorized to be paid from the Treasury. Contrary to the court of appeals' view, the ISDA does not create a statutory entitlement to funding for contract support costs without re-

gard to Congress's appropriations decisions. Nor did—or could—the Secretary obligate the Treasury by contract to pay the full amount of respondents' requested contract support costs irrespective of the maximum sums that Congress authorized. The judgment of the court of appeals should be reversed.

1. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7. By reserving to Congress the prerogative to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM* v. *Richmond*, 496 U.S. 414, 427-428 (1990).

Each year since FY 1994, Congress has exercised its constitutional prerogative by imposing explicit "not to exceed" caps on the funds available to the Secretary for ISDA contract support costs. Those caps reflect Congress's judgment that the important federal policies served by underwriting such costs do not justify jeopardizing the funding available for other programs for Indians and Indian tribes—including essential services for tribes that have elected *not* to enter into ISDA contracts. It is difficult to posit a judgment more firmly committed to Congress, and the court of appeals had no warrant to set it aside.

Nothing in the ISDA suggests, let alone expressly provides, that the Secretary is empowered to obligate funds that Congress has not appropriated. There are a handful of federal statutes that confer so-called "contract

authority"—the power to bind the United States to contracts for which Congress has not yet appropriated funds. But the ISDA is not among them. To the contrary, the Act provides that all federal funding contemplated by the ISDA is "subject to the availability of appropriations." 25 U.S.C. 450j-1(b). As this Court has explained, Congress employs statutory language of this kind precisely to make clear that agency officials do *not* have the authority to obligate money Congress has not appropriated. And because the ISDA does not confer such authority, no contract signed by the Secretary could obligate the United States to pay funds from the Treasury in excess of the maximum sums authorized by Congress.

2. The court of appeals articulated no coherent theory on which the government may be held liable for failing to pay amounts that Congress has forbidden to be paid. The court of appeals' decision rests on the fundamentally mistaken premise that the ISDA "guarantee[s]" federal funding for contract support costs, and that the appropriations caps imposed by Congress have therefore caused "an on-going breach of the ISDA's promise." Pet. App. 45a. By its plain terms, however, the ISDA provides no such guarantee. To the contrary, Congress provided that *all* duties imposed under the Act—including both the government's obligation to provide federal funding and tribal contractors' obligation to administer the contracted federal programs—are subject to the availability of appropriations.

Likewise, nothing in respondents' contracts with the Secretary confers a right to receive funding that Congress has not appropriated. The court of appeals believed that, because Congress appropriated sufficient funds each year to pay any *single* contractor considered

in isolation, a federal court may properly order the Treasury to pay *all* of the costs requested by *all* contractors irrespective of the total sum. That approach would nullify the appropriations caps imposed by Congress and would undermine Congress's authority to control the use of public funds in the Treasury. A statutory appropriation of "not to exceed $1 million" is plainly not a license for agency officials to commit the United States to an unlimited number of contracts for $999,999.

Finally, the court of appeals' suggestion that respondents may simply recover from the Judgment Fund any contract support costs that Congress declined to appropriate is without merit. The Judgment Fund is not a back-up source of agency appropriations. Nor is it an invitation to litigants to circumvent express restrictions Congress has imposed on the expenditure of funds from the Treasury. Because of the statutory caps, the United States is not liable to respondents for contract support costs in excess of the appropriated sums. And because there is no liability, there is no basis for a judgment to be paid from the Judgment Fund.

ARGUMENT

I. THE SECRETARY OF THE INTERIOR PROPERLY REFUSED TO PAY CONTRACT SUPPORT COSTS IN EXCESS OF THE FIXED AMOUNTS APPROPRIATED BY CONGRESS FOR THAT PURPOSE

A. Congress Has Plenary Authority Over The Use Of Public Funds

1. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7. This Court has explained that the Appropriations Clause conveys a "straightforward and explicit command" that

no money "can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937)). Indeed, an "appropriation" is simply a license from Congress "to incur obligations and to make payments from [the] Treasury for specified purposes." 1 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 2-5 (3d ed. 2004) (*Red Book*); see also *Andrus* v. *Sierra Club*, 442 U.S. 347, 359 n.18 (1979). By reserving to Congress the right to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM* v. *Richmond*, 496 U.S. at 427-428.

Congress's constitutional authority to prescribe limitations on the use of public money in the Treasury—and its corresponding accountability to the public for its exercise of that authority—is an essential feature of the Constitution's separation of powers. The Appropriations Clause promotes the rule of law and "prevent[s] fraud and corruption" by limiting the ability of Executive Branch officials to commit the federal government to endeavors Congress has not approved. *OPM* v. *Richmond*, 496 U.S. at 427; see *Cincinnati Soap Co.*, 301 U.S. at 321 (Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department"); *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not * * * previously sanctioned.

Any other course would give to the fiscal officers a most dangerous discretion."); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213-214 (1833) (but for the Appropriations Clause, "the Executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure"). James Madison thus described Congress's "power over the purse" as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance." The Federalist No. 58, at 357 (Clinton Rossiter ed., 1961).

Congress's authority under the Appropriations Clause is, of course, constrained by the Constitution itself. See *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 588 (1998) ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."). Thus, Congress could not use its appropriations power to enact a bill of attainder, *United States* v. *Lovett*, 328 U.S. 303, 315 (1946), to reduce the compensation of Article III judges, *United States* v. *Will*, 449 U.S. 200, 221-226 (1980), to punish disfavored speech, *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 548-549 (2001), or to interfere with the President's constitutional prerogatives, *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1871) (pardon power). But where no specific constitutional limit is at issue, it is for Congress alone to determine how much of the public's money shall be available from the Treasury to spend for a given purpose. See *OPM* v. *Richmond*, 496 U.S. at 425 (the authority of all federal officials is "limited by a valid reservation of congressional control over funds in the Treasury").

2. Congress has reinforced its power of the purse in a series of statutes that together establish the basic framework of federal appropriations law. See 1 *Red Book* 1-12. Three have particular relevance here. First, Congress has directed that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. 1301(a). Thus, an agency is not free to take money that Congress has appropriated expressly for one purpose and redirect it to another. See also 31 U.S.C. 1532. Second, Congress has provided that a law "may be construed * * * to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states * * * that such a contract may be made." 31 U.S.C. 1301(d). Consequently, a statute permitting (or even directing) the government to enter into contracts normally does not permit agency officials to bind the United States to contracts beyond the amount of the appropriations provided by Congress. *Ibid*; see, *e.g.*, *Sutton* v. *United States*, 256 U.S. 575, 579 (1921) (citing predecessor provision to Section 1301(d)).

Finally, under the Anti-Deficiency Act, "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM* v. *Richmond*, 496 U.S. at 430 (citing 31 U.S.C. 1341, 1350). In pertinent part, the Anti-Deficiency Act provides:

> An officer or employee of the United States Government * * * may not * * * make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

31 U.S.C. 1341(a)(1)(A); see 31 U.S.C. 1350 (criminal penalties). Congress enacted this provision in the early 20th Century to address the recurring problem of "coercive deficiencies"—the tendency of federal agencies to exhaust their appropriations early in the fiscal year and then return to Congress for supplemental appropriations to cover outstanding commitments that, although not legally binding, Congress nonetheless felt it could not refuse to pay in good conscience. 2 *Red Book* 6-34; see 59 Comp. Gen. 369, 372 (1980). The broad prohibition on deficiency contracts that Congress enacted to put an end to that practice could scarcely be more explicit. "When [an] appropriation is fully expended, no further payments may be made *in any case*." 2 *Red Book* 6-41 (emphasis added). Absent some other unrestricted source of budget authority, an agency's power to "make or authorize" payments from the Treasury expires when the relevant appropriations are exhausted. See, *e.g.*, *Sutton*, 256 U.S. at 579; *Bradley* v. *United States*, 98 U.S. 104, 113-114, 117 (1878).

B. Since FY 1994, Congress Has Expressly Capped The Appropriations Available To The Secretary To Pay ISDA Contract Support Costs

In each fiscal year since FY 1994, Congress has imposed an express statutory cap on the appropriations available to the Secretary to pay contract support costs under the ISDA. See pp. 8-9, *supra*. It has done so by inserting a "not to exceed" proviso into the annual appropriations act for the BIA's administration of Indian programs. In FY 1995, for example, Congress appropriated more than $1.5 billion to the BIA, but stipulated that "*not to exceed $95,823,000*" of that sum "shall be for payments to tribes and tribal organizations for contract sup-

port costs associated with ongoing contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended." Pub. L. No. 103-332, 108 Stat. 2511 (emphasis added). The specific sums that Congress has appropriated have varied from year to year, but the "not to exceed" language has not.

As the plain meaning of the phrase "not to exceed" makes evident, these are classic statutory appropriations caps. The specified sums are the maximum amounts the Secretary may lawfully obligate for contract support costs in the relevant fiscal year. The Comptroller General has explained that, in the parlance of federal appropriations law, "not to exceed" is "susceptible of but one meaning": the agency "may not expend more than" the specified sum for the purpose designated by Congress, "and any expenditures in excess of that amount would be unlawful." 64 Comp. Gen. 263, 264 (1985); see also 2 *Red Book* 6-32 (describing the phrase "not to exceed" as "the most effective way to establish a maximum" sum available for a specified purpose). Congress has used variants of the same formulation to exercise its authority under the Appropriations Clause since the inception of the Nation: the first general appropriations act, passed in September 1789, appropriated "for the service of the present year," *inter alia*, "a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids." Act of Sept. 29, 1789, 1 Stat. 95.

In each fiscal year at issue, therefore, Congress has prohibited the Secretary from obligating more for contract support costs than the specific sums appropriated. The statutory "not to exceed" caps distinguish this case from *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), which involved the government's liability for ISDA contract support costs under contracts that were

funded by an ordinary, unrestricted, lump-sum appropriation. *Id.* at 636-637. In holding that the government could properly be held liable for contract support costs the Indian Health Service did "not deny that it promised to pay," the Court repeatedly stressed that Congress had "appropriated sufficient *legally unrestricted* funds to pay the contracts at issue." *Id.* at 636, 637 (emphasis added).

Indeed, the tribes in *Cherokee* highlighted the absence of statutory restrictions in the relevant appropriations acts. In urging that the IHS was liable for their unpaid contract support costs in fiscal years 1994-1997, the tribes specifically contrasted the IHS's unrestricted appropriations with the statutory caps imposed by Congress on the BIA's appropriations during the same period—*i.e.*, the appropriations caps at issue in this case. See *Cherokee*, Nos. 02-1472 & 03-853, Pet. Br. 29 (arguing that "Congress's deliberate use of the term of art 'not to exceed' elsewhere forecloses inferring * * * a comparable legal restriction on IHS's payment of [contract support costs]"); see also *id.*, Pet. Reply Br. 6-7 (arguing that "*only* Congress, acting through annual Appropriations Acts, can alter the Secretary's duty to pay ISDA contracts at the full amounts required by that Act"). In ruling in favor of the tribes, in turn, this Court repeatedly referred to the fact that Congress had placed no statutory restriction on the Secretary's ability to reprogram other funds from within the agency's lump-sum appropriations for the relevant fiscal years to pay the amounts promised.[8]

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[8] See, *e.g.*, *Cherokee*, 543 U.S. at 637 ("These appropriations Acts contained no relevant statutory restriction."); *id.* at 640 (discussing who "should bear the risk that an unrestricted lump-sum appropriation would prove insufficient" to pay all contractors); *id.* at 643 (concluding that the ISDA's availability-of-appropriations provision was irrelevant

Here, by contrast, it is undisputed that Congress has, by statute, "capp[ed] appropriations at a level well below the sum total" of all tribal requests for contract support costs in every fiscal year since 1994. Pet. App. 2a. Those appropriations caps reflect quintessential legislative choices regarding the best use of public funds. Although the policies served by funding contract support costs under the ISDA are important, see 25 U.S.C. 450a, Congress concluded that it was necessary to limit such funding in order to provide for other programs benefitting Indians and Indian tribes. It is difficult to posit a judgment more firmly committed to Congress's discretion. See U.S. Const. Art. I, § 9, Cl. 7; *OPM* v. *Richmond*, 496 U.S. at 428.

The legislative history of the relevant appropriations acts leaves no doubt that Congress exercised precisely that sort of judgment in choosing among competing priorities. The Conference Report accompanying the BIA's appropriation for FY 1994, for example, explained that a statutory cap on contract support costs was warranted because "significant increases in contract support will make future increases in tribal programs difficult to achieve." H.R. Conf. Rep. No. 299, 103d Cong., 1st Sess. 28 (1993). Similarly, the Senate Report accompanying the FY 1995 appropriation expressed concern that swelling contract support costs might prevent the BIA from providing adequate services to Indian tribes that had *not* opted to enter into ISDA contracts: "In order to protect the Bureau's ability to provide services to those tribes who do not elect to contract for a part or all of their programs, the Committee has retained bill language which

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because "Congress appropriated adequate unrestricted funds here"); *id.* at 647 (emphasizing that Congress "unambiguously provided unrestricted lump-sum appropriations").

establishes a limit of the amount of funding to be available for contract support." S. Rep. No. 294, 103d Cong., 2d Sess. 57 (1994). And in considering the BIA's FY 1999 budget, the Appropriations Committee in the House of Representatives expressed concern that the continued growth of contract support costs would undermine Congress's ability to provide essential funding for Indian programs: "[T]he Committee cannot afford to pay 100% of contract support costs at the expense of basic program funding for tribes[.]" H.R. Rep. No. 609, 105th Cong., 2d Sess. 125-126 (1998); see also H.R. Conf. Rep. No. 825, 105th Cong., 2d Sess. 1234 (1998) (noting the funding shortfall but expressing concern that the "remedy cannot be a large infusion of additional funding for contract support costs at the expense of either critical health programs or critical construction needs of the [Indian Health] Service."). It is manifestly within Congress's authority both to make such judgments and to enforce them by imposing "not to exceed" caps on agency appropriations.

C. The Secretary Was Without Authority To Obligate The United States To Pay More Than The Statutory Appropriations Caps Allowed

Respondents contend in this litigation that the statutory appropriation caps "do not diminish or eliminate" the government's liability for ISDA contract support costs. Pet. App. 91a (quoting respondents' motion for summary judgment). But respondents do not dispute that, for each fiscal year at issue, the entirety of the fixed sum that Congress appropriated for contract support costs has been expended. As the district court found, the BIA distributed to tribal contractors in each year in question "the full amount" of funding for contract sup-

port costs that Congress authorized. *Id.* at 98a. The available funds were sufficient to cover between 77% and 93% of respondents' requested funding, depending on the year in question. See *id.* at 10a. Under the terms of the relevant appropriations acts ("not to exceed"), the Secretary had no authority to use other agency funds to make up the shortfall. Unlike in *Cherokee*, therefore, there are no other "unrestricted funds" available to the agency. 543 U.S. at 641.

That conclusion is by itself sufficient to resolve this case. The government's liability for contract support costs under the ISDA does not extend beyond the sums Congress authorized for that purpose. As we explain below, the ISDA expressly provides that all funding under ISDA contracts is subject to the availability of appropriations (pp. 36-43, *infra*), and nothing in respondents' contracts with the Secretary even arguably promises that the government will pay contract support costs in excess of the appropriated sums (pp. 43-46, *infra*). Respondents' arguments thus fail under the plain terms of the statute and contracts at issue. But the court of appeals' decision would require reversal even if the ISDA and the relevant contracts made no mention of appropriations. That is because, except in rare circumstances not presented here, federal officials have no authority to obligate the United States to pay money in excess of authorized appropriations.

1. The ISDA does not empower the Secretary to obligate public funds in excess of appropriations

Under settled principles of federal appropriations law, a statute "may be construed * * * to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states * * *

that such a contract may be made." 31 U.S.C. 1301(d). Thus, the official drafting manual of the Senate provides that it is "unnecessary" to specify (as the ISDA does) that obligations imposed by statute are "subject to the availability of appropriations," because "[a] direction to an agency head to carry out a specific program or activity does not create implied direct spending authority." U.S. Senate, Office of Legislative Counsel, *Legislative Drafting Manual* § 130(a)(5), at 43 (1997); see also Anti-Deficiency Act, 31 U.S.C. 1341(a).

Nothing in the ISDA suggests, let alone expressly provides, that the Secretary is empowered to obligate the United States to pay money that Congress has not appropriated. The ISDA is wholly unlike the handful of federal statutes that confer what is known in appropriations law as "contract authority"—the power to bind the United States to contractual obligations irrespective of appropriations. See 2 *Red Book* 6-88. A provision of the Price-Anderson Act, for example, authorizes the Nuclear Regulatory Commission to "make contracts in advance of appropriations and incur obligations without regard to," *inter alia*, the Anti-Deficiency Act. 42 U.S.C. 2210(j). Similarly, Congress has provided an exception to the prohibition against deficiency contracts for purchases by the Secretary of Defense for "for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies," provided that such purchases do "not exceed the necessities of the current year." 41 U.S.C. 6301(b) (Supp. IV 2010). The ISDA, by contrast, expressly provides that "the amounts" of all tribal self-determination contracts "shall be subject to the availability of appropriations," 25 U.S.C. 450j(c), and that "[n]otwithstanding any other provision in this [Act], the provision of funds under this [Act] is subject to the availability of

appropriations," 25 U.S.C. 450j-1(b). As this Court observed in *Cherokee*, Congress enacts provisions of this kind precisely to make clear that agency officials do *not* possess the "special statutory authority needed to bind the Government without regard to the availability of appropriations." 543 U.S. at 643.

Nor is the ISDA among the few statutory programs for which Congress has authorized permanent, indefinite appropriations. 31 U.S.C. 1305. Section 1305 provides open-ended appropriations of all "[n]ecessary amounts" not only for such fundamental objects as the payment of interest on the public debt, 31 U.S.C. 1305(2), but also for specific statutory programs, see, *e.g.*, 31 U.S.C. 1305(10) (permanent appropriation for rental housing assistance contracts under the National Housing Act). As the appropriations caps at issue in this case illustrate, however, Congress has not chosen to place the ISDA outside the annual appropriations process in the same fashion. The ISDA does not authorize the Secretary to obligate the United States to pay more than the amounts that Congress chooses to appropriate.

2. The Secretary consequently could not bind the United States by contract to pay more than the appropriated sums

Because the ISDA does not confer on the Secretary the "special statutory authority needed to bind the Government without regard to the availability of appropriations," *Cherokee*, 543 U.S. at 643, an ISDA contract that purported to do so would be without legal effect. As we explain below (pp. 43-46, *infra*), the Secretary has not in fact made any such contractual commitment to respondents. But it would make no difference if he had. As this Court has consistently held, an *ultra vires* promise by a

government official to pay sums in excess of appropriations does not bind the United States. See *Leiter* v. *United States*, 271 U.S. 204, 206-207 (1926); *St. Louis Sw. Ry. Co.* v. *United States*, 262 U.S. 70, 75-76 (1923); *Sutton*, 256 U.S. at 579; *Hooe* v. *United States*, 218 U.S. 322, 333 (1910); *United States* v. *Jones*, 121 U.S. 89, 100-101 (1887); *Bradley*, 98 U.S. at 113-114, 117; *Reeside*, 52 U.S. (11 How.) at 291. As the Court explained in *Hooe*, if a federal official

> assumes to bind the Government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, *the contract is a nullity*, so far as the Government is concerned, and no legal obligation arises upon its part to meet its provisions.

218 U.S. at 334 (emphasis added). Even "the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation." *Bradley*, 98 U.S. at 114.

That rule is simply an application of the settled proposition that the United States cannot be bound in contract by agents acting without actual authority. See, *e.g.*, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947); *Sutton*, 256 U.S. at 578-581; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Whiteside* v. *United States*, 93 U.S. 247, 256-257 (1876); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 675-683 (1868). The common principle underlying those decisions is that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power*

& Light Co., 243 U.S. at 409. As this Court has explained, that rule "does not reflect a callous outlook" toward government contractors, but "merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Merrill*, 332 U.S. at 385.

In *Sutton*, for example, Congress appropriated funds for the improvement of a shipping channel in Florida. 256 U.S. at 577. The Secretary of War signed a contract for the work, and payment was made to the contractor on an installment basis according to progress reports by a government inspector. *Ibid.* Eventually it was discovered that the inspector had underestimated the amount of work done and that, according to the unit rates in the contract, the amount due was "far in excess" of the appropriated sum. *Ibid.* After halting work and collecting partial payment from the available appropriations, the contractor sued for the shortfall, arguing that the government had agreed to the contract terms and that the contract had been valid when entered. *Id.* at 578. The contractor also argued that the inspector's erroneous reports, on which the parties had relied, created "an implied contract for the fair value of the work performed." *Id.* at 580.

In a unanimous opinion by Justice Brandeis, this Court rejected the contractor's arguments and held that the United States was not liable for any amount in excess of the available appropriations. *Sutton*, 256 U.S. at 578-579. Although Congress had authorized the project and had appropriated sums for its completion, the Court reasoned, "by none of these acts was any authority conferred upon the Secretary of War * * * to contract to expend more than the amount then appropriated." *Id.* at 578. Citing the statutory predecessor to 31 U.S.C.

1301(d), the Court reasoned that Congress had not clearly authorized the making of a deficiency contract. "The Secretary of War was, therefore, without power to make a contract binding the Government to pay more than the amount appropriated." *Sutton*, 256 U.S. at 579. Moreover, when it was discovered that the contractor had obtained reimbursement for a portion of the shortfall out of a subsequent year's appropriation, the government recovered that payment from the contractor. This Court upheld that action as well, reasoning that Congress "did not authorize the application of any part of the [subsequent] appropriation to work theretofore done," and "[t]he payment therefrom having been unauthorized, [it] did not bind the government." *Id.* at 579-580. Finally, the Court in *Sutton* rejected the contractor's contention that the inspector's erroneous reports had created an "implied contract" binding the government to pay the "fair value of the work performed" in excess of the appropriated sum. *Id.* at 580. The Court explained: "[T]he short answer to this contention is that since *no official of the government could have rendered it liable for this work by an express contract*, none can by his acts or omissions create a valid contract implied in fact." *Ibid.* (emphasis added).[9]

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[9] The Court in *Sutton* did require, however, that the government pay the contractor nearly $2000 that the War Department had deducted from the appropriation for the agency's administrative expenses, reasoning that "[t]he fund otherwise available for work actually performed should be applied to that purpose." 256 U.S. at 581. It is undisputed that, in this case, the Secretary distributed to respondents "the full amount" of the fixed sums appropriated by Congress for contract support costs. Pet. App. 98a.

II. NEITHER THE ISDA ITSELF NOR ANY CONTRACT THEREUNDER ENTITLES RESPONDENTS TO RECOVER CONTRACT SUPPORT COSTS IN EXCESS OF THE APPROPRIATIONS CAPS

The Tenth Circuit articulated no plausible theory on which the government may be held liable for failing to pay amounts that Congress has forbidden to be paid. The court of appeals suggested at points (*e.g.*, Pet. App. 2a, 4a-8a, 45a-46a) that tribes' purported entitlement to "full funding" of contract support costs irrespective of appropriations springs from the ISDA itself; at other points, it appeared to believe that such an entitlement flows from principles of government contract law (*e.g.*, *id.* at 21a-34a). Neither theory has merit. The ISDA expressly provides that the duties imposed under the Act—including both the government's obligation to provide federal funding and tribal contractors' obligation to administer the contracted federal programs—is subject to the availability of appropriations. And consistent with that statutory scheme, respondents' contracts with the Secretary do not confer a right to receive funding that Congress has not appropriated.

A. Congress Expressly Reserved Its Discretion To Control Appropriations Under The ISDA

1. As originally enacted, the ISDA required the Secretary to provide to a tribal contractor the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" directly by the agency during the fiscal year. 25 U.S.C. 450j-1(a)(1). Congress became concerned, however, that tribes often found it necessary in administering federally funded services to divert program funding or other tribal resources "to pay for the indirect costs associated with programs

that are a federal responsibility." S. Rep. No. 274, 100th Cong., 1st Sess. 9 (1987) (1987 Senate Report). Congress accordingly amended the ISDA to require that, in addition to the secretarial amount, the Secretary must also provide "an amount for" the tribal organization's reasonable "contract support costs," which are costs that tribes must incur but that the Secretary would not incur. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (25 U.S.C. 450j-1(a)(2)) (1988 amendments).

The Tenth Circuit construed the 1988 amendments to "guarantee[] funding" for the contract support costs incurred by tribes. Pet. App. 45a; see also *id.* at 2a (asserting that "Congress has mandated that all self-determination contracts provide full funding" of contract support costs). Even on its face, however, the Act creates no such entitlement: a requirement that the Secretary provide "*an amount for* [a contractor's] reasonable costs," 25 U.S.C. 450j-1(a)(2) (emphasis added), is not naturally read to mean that the government must pay *all* reasonable costs. That inference is reinforced by the following provision, which speaks of "[t]he contract support costs that are *eligible* costs for purposes of receiving funding," 25 U.S.C. 450j-1(a)(3) (emphasis added), rather than the costs that *shall* receive funding.

The court of appeals also relied on 25 U.S.C. 450j-1(g), see Pet. App. 2a, 46a, but that provision does not create a "guarantee" of funding either. Section 450j-1(g) simply provides that, when an ISDA contract is approved, the Secretary "shall add to the contract the full amount of funds to which the contractor is entitled *under subsection (a) of this section*," 25 U.S.C. 450j-1(g) (emphasis added)—that is, the secretarial amount, 25 U.S.C. 450j-1(a)(1), plus "an amount for" the contractor's rea-

sonable contract support costs, 25 U.S.C. 450j-1(a)(2). The Act nowhere guarantees that every dollar incurred or requested by a tribal organization for contract support costs will be paid, let alone that it will be paid without regard to whether Congress appropriates the necessary funds. Indeed, in enacting Section 450j-1(g), Congress explained that its purpose was to ensure that contract support costs "are continuously available, *unless the Congress reduces such funds by appropriations actions.*" 1987 Senate Report 34 (emphasis added).

2. In any event, other provisions of the ISDA confirm that the Act does not "guarantee[]" (Pet. App. 45a) to a tribal contractor any particular level of federal funding. Congress made clear in at least four places in the ISDA that, although the Act would permit tribes to administer federally funded programs, Congress retained complete control over the disbursement of public funds from the Treasury, just as it would if the same programs had continued to be administered by the Secretary.

First, while the Act generally "direct[s]" the Secretary "to enter into a self-determination contract" at the request of an Indian tribe, 25 U.S.C. 450f(a)(1), it provides that "[t]he *amounts* of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c)(1) (emphasis added). The Act thus contemplates that the initial determination of the government's financial obligation under an ISDA contract in a particular fiscal year—including any "amount for" the tribe's contract support costs—will depend on the amounts made available to the Secretary for that fiscal year by Congress. Cf. 25 U.S.C. 450j(c)(2) (providing that "[t]he amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors").

Second, Congress stipulated that "[e]ach self-determination contract" must "contain, or incorporate by reference," certain standard contract terms. 25 U.S.C. 450*l*(a)(1). Those terms, which Congress set out in the Act itself, specify that a lack of sufficient appropriations may excuse performance by *either* party: the Secretary's obligation to provide the agreed sums is "[s]ubject to the availability of appropriations," and the contractor's obligation to "administer the programs, services, functions, and activities identified in th[e] Contract" is likewise "[s]ubject to the availability of appropriated funds." 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (c)(3)). The tribe, moreover, is "not * * * obligated to continue performance" if doing so would "require[] an expenditure of funds in excess of the amount of funds awarded under th[e] Contract." *Ibid.* (model agreement § 1(b)(5)). Thus, if a tribe cannot carry out a contract due to statutory restrictions on the availability of appropriated funds, the options open to the tribe are to decline to enter into the contract, to curtail performance, or to renegotiate the scope of the work—not to seek to recover as damages the additional amounts that Congress has forbidden to be paid.

Third, the Act requires the Secretary to submit annual reports to Congress containing, *inter alia*, an accounting of "any deficiency in funds needed to provide required contract support costs to all contractors." 25 U.S.C. 450j-1(c). Such a report would be superfluous if, as the Tenth Circuit believed, Congress had "mandated that all self-determination contracts provide full funding" of contract support costs. Pet. App. 2a.

Finally, in the same 1988 amendments that added the ISDA's provision concerning contract support costs,

Congress simultaneously enacted the Act's most explicit reservation of Congress's appropriations authority:

> *Notwithstanding any other provision in this subchapter*, the provision of funds under this subchapter is *subject to the availability of appropriations* and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. 450j-1(b) (emphasis added); see 1988 amendments, § 205, 102 Stat. 2292. The "subchapter" to which this provision refers is Title 25 ("Indians"), Chapter 14 ("Miscellaneous"), Subchapter II ("Indian Self-Determination and Education Assistance"), and it encompasses *all* relevant provisions of the ISDA—including the provisions governing contract support costs. Thus, the "provision of funds" under the ISDA is subject to the availability of appropriations, "[n]otwithstanding any other provision" in the ISDA itself. And lest there be any doubt, in every annual appropriations act for the BIA since FY 1999, Congress has provided that the statutory cap on funding for contract support costs shall apply "notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended." *E.g.*, 112 Stat. 2681-245.

In light of this unequivocal statutory language, the D.C. and Federal Circuits have both rejected the notion that the ISDA guarantees any particular level of federal funding as a matter of right. See *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296, 1304 (Fed. Cir. 2010) (*Arctic Slope*) (Section 450j-1(b) "limits the Secretary's obligation to the tribes to the appropriated amount"), petition for cert. pending, No. 11-83 (filed July 18, 2011);

Babbitt v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1380 (Fed. Cir. 1999) ("The unequivocal statutory language prevents [an ISDA contractor] from asserting that it was entitled to full funding as a matter of right."), cert. denied, 530 U.S. 1203 (2000); *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1345 (D.C. Cir. 1996) ("[I]f the money is not available, it need not be provided, despite a Tribe's claim that the ISDA 'entitles' it to the funds."); see also Pet. App. 82a (Hartz, J., dissenting) ("[T]he ISDA does not require full payment. Full payment is conditioned on the availability of funds.").

3. The court of appeals was therefore mistaken in its premise that Congress "guarantee[d] funding" for contract support costs in the ISDA itself.[10] Pet. App. 45a. To the contrary, Congress expressly retained its discretion to control the funding available under the ISDA through the annual appropriations process. See 25 U.S.C. 450j(c); 25 U.S.C. 450j-1(b). The "apparent contradiction" that the court of appeals perceived between

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[10] The Tenth Circuit has since reaffirmed its erroneous interpretation of the ISDA, holding that an Indian tribe is "entitled to a contract specifying the full statutory amount" of contract support costs and that the government is forbidden even from negotiating for the tribe's agreement to accept a lower sum in light of the lack of available appropriations. *Southern Ute Indian Tribe* v. *Sebelius*, 657 F.3d 1071, 1083 (10th Cir. 2011), petition for cert. pending, No. 11-762 (filed Dec. 19, 2011). In that case, the Indian Health Service declined a tribe's request for an ISDA contract on the ground that, because of a statutory cap, the agency lacked sufficient appropriations to fund the contract. *Id.* at 1075-1076. The Tenth Circuit ruled that the agency was nonetheless required to accept the contract as proposed by the tribe, even though it appeared that the IHS would immediately be in breach of the contract under the same court's ruling in the decision below. See *id.* at 1079-1080. Congress cannot have intended that result.

the ISDA and Congress's funding decisions, Pet. App. 2a, is thus no contradiction at all. Since FY 1994, Congress has appropriated more than $2.3 billion in public funds for ISDA contract support costs. But at the same time, Congress preserved its discretion to decide each year how much of the public's money should be spent for that purpose. And as already discussed (pp. 21-23, *supra*), that is Congress's prerogative: the ISDA serves important federal policies, but those policies remain subject to congressional revision. Respondents do not assert any constitutional entitlement to funding for contract support costs; Congress could repeal the 1988 amendments, or the entire ISDA, if it wished. The amount of funding to be provided under the Act is committed to Congress's discretion, just as the annual budget of the BIA is committed to Congress's discretion. The ISDA simply permits Indian tribes to administer any federal "programs, functions, services, or activities" that the Secretary would otherwise have provided for the benefit of Indians. 25 U.S.C. 450f(a). Those programs and services do not become uniquely immune from the federal appropriations process merely because they are administered by tribal contractors rather than BIA officials.

In reaching the opposite conclusion, the Tenth Circuit found "particularly important" (Pet. App. 15a) the canon of statutory construction providing that legislation concerning Indians and Indian tribes should be construed liberally in their favor. See, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93-94 (2001). Likewise, the court of appeals pointed to the ISDA's own policy of liberal construction in favor of tribal contractors. Pet. App. 15a (citing 25 U.S.C. 450*l*(c) (model agreement § 1(a)(2)). As this Court has explained, however, such interpretative principles "are designed to help judges determine

the Legislature's intent as embodied in particular statutory language," and they have no application where the meaning of the relevant statutory text is clear. *Chickasaw Nation*, 534 U.S. at 94. That is particularly true here, where the statutory text merely reinforces what the Constitution itself provides. See pp. 21-23, *supra*. Because the ISDA itself did not mandate—and indeed prohibited—payment of the full amount of contract support costs requested by respondents for the fiscal years in question, respondents have no right to recover damages under the terms of the Act. See *United States* v. *Navajo Nation*, 556 U.S. 287, 290, 296, 301-302 (2009); *United States* v. *Navajo Nation*, 537 U.S. 488, 506 (2003).

B. Respondents Have No Contractual Right To Payment Of Contract Support Costs Irrespective Of Appropriations

The court of appeals also sought to justify its conclusion in terms of government contract law. *E.g.*, Pet. App. 26a-34a. But respondents have no valid claim for breach of contract because the Secretary did not promise to pay contract support costs in excess of the total available appropriations. Indeed, as already discussed (pp. 29-35, *supra*), the Secretary *could not* obligate the United States to pay money in excess of appropriations because his authority to bind the United States expired at the limit of the available appropriations in each fiscal year. See, *e.g.*, *Sutton*, 256 U.S. at 579. The court of appeals' decision effectively imposes on the United States contractual obligations that no federal official had the authority to accept.

1. The Secretary did not promise to pay respondents' contract support costs in excess of appropriations

The court of appeals pointed to no actual contract signed by the Secretary promising to pay respondents'

contract support costs without regard to appropriations. The court's inability to find an unambiguous promise of that kind is hardly surprising, given that "[i]t is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM* v. *Richmond*, 496 U.S. at 430. In fact, the Secretary's contracts and annual funding agreements with respondents specified that all funding for contract support costs was "[s]ubject to the availability of appropriations," as the ISDA requires, 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4)). Pet. App. 10a-11a; see, *e.g.*, J.A. 98, 123, 206.

Moreover, as the dissent below explained, other provisions in the parties' agreements "recognized that contract-support costs might not be fully paid." Pet. App. 51a (Hartz, J., dissenting). For example, the Oglala Sioux annual funding agreement for 2001 provided that *the tribe's recovery for indirect contract support costs* would be calculated by multiplying the amount that the tribe would otherwise receive by a "percentage of rate funded by BIA"—*i.e.*, a funding rate tied to the available appropriations. J.A. 132; see Pet. App. 51a-53a; see also *id.* at 51a (quoting contract language providing that funding for contract support costs "shall be provided by the Bureau of Indian Affairs, subject to the availability of funding"); *id.* at 12a-13a (majority opinion) (noting that annual funding agreements for the Ramah Navajo Chapter and the Oglala Sioux Tribe reflected "uncertainty" about the contract support cost funding percentage because the BIA did not determine the percentage until the fiscal year was underway). Like the ISDA itself, the parties' contractual agreements recognized that funding for all contract support costs was *not* guaran-

teed, but was instead contingent upon the availability of appropriations.

2. Respondents' contract claims fail on their own terms

Even if the Secretary could obligate the United States to pay monies that Congress has not appropriated, respondents' contract claims would fail on their own terms. Because Congress capped the appropriations for contract support costs at a level below the total required to satisfy respondents' claims, the "availability of appropriations" contingency in the ISDA itself and in each of the Secretary's agreements with respondents precludes any claim for breach of contract.

The plain import of the "availability of appropriations" contingency is that the Secretary has no contractual duty to pay funds that Congress has not appropriated. Thus, in *Bradley* v. *United States*, *supra*, the government leased a building in Washington, D.C. for the use of the Post Office. The lease provided that the government would pay $4200 per year in rent, but the parties "understood and agreed with each other that the lease was made subject to an appropriation by Congress for the payment of the stipulated rental." 98 U.S. at 112. When Congress appropriated only $1800 for the final year's rent, the lessor brought suit to recover the difference between the amount appropriated and the contract rent. This Court rejected the claim and held that, under the plain terms of the contract, the government was liable only for the amount Congress appropriated. *Id.* at 114. Observing that the contract had been executed against the backdrop of the Appropriations Clause and statutory prohibitions on deficiency contracts that "in one form or another have been in operation without question throughout nearly the whole period since the adop-

tion of the Constitution," the Court reasoned that "the words of the indenture are amply sufficient to effect the object which the person who drafted the instrument intended to accomplish." *Ibid.*

Likewise, in *Sutton*, the contract provided that the government would pay for the work done "within the limits of available funds." 256 U.S. at 577. In rejecting the contractor's claim for amounts in excess of the available funds, the Court noted that the contract itself did not purport to "bind the government for any amount in excess of the appropriation. On the contrary, it limit[ed] to the amount of the appropriation the work which may be done." *Id.* at 579.

The Tenth Circuit stressed (Pet. App. 27a-30a) that this Court rejected the government's reliance on similar contract language in *Cherokee*. See 543 U.S. at 643. But the Court rejected that argument in *Cherokee* because, in that case, there were no statutory restrictions on the Secretary's ability to pay the claims at issue. See *ibid.* Here, by contrast, the relevant appropriations are expressly restricted.

3. The Tenth Circuit's "single contractor in isolation" theory is untenable

The court of appeals believed that the "availability of appropriations" for each individual contract must be determined by comparing that specific contract to the total sum appropriated by Congress, without reference to any other contract to be funded by the Secretary from the same appropriated sum. Pet. App. 26a. Thus, in the court of appeals' view, if an appropriation is sufficient to satisfy the claim of a *single* contractor considered in isolation, the government must pay *all* such contractors, regardless of any overall statutory limit imposed by Con-

gress. *Id.* at 29a-30a. The court of appeals reasoned that, unless it amends the Act itself, Congress must "limit appropriations on a contract-by-contract basis" for each of the hundreds of tribal contractors nationwide if it wishes to restrict the public funds available to pay contract support costs. *Id.* at 46a.

a. That cramped view of Congress's appropriations authority is untenable. As the Federal Circuit explained in rejecting the same theory, the court of appeals' approach would "effectively defeat" the statutory limits imposed by Congress on the withdrawal of money from the Treasury. *Arctic Slope*, 629 F.3d at 1304; see also Pet. App. 47a (Hartz, J., dissenting) (explaining that the majority's reasoning "renders futile the spending cap imposed by Congress"). The manifest purpose of Congress in enacting the appropriations caps was to limit the public funds available to pay ISDA contract support costs. See, *e.g.*, H.R. Rep. No. 609, 105th Cong., 2d Sess. 125-126 (1998) ("[T]he Committee cannot afford to pay 100% of contract support costs at the expense of basic program funding for tribes[.]"). The court of appeals' theory, under which each tribal contractor could recover its requested contract support costs without regard to the total sum that may be drawn from the Treasury for that purpose, is fundamentally inconsistent with that judgment and would render the appropriations caps meaningless. Indeed, it would undermine Congress's ability to control federal expenditures generally through the standard mechanism of "not to exceed" statutory specifications. An appropriations cap of $1 million is plainly not a license for agency officials to commit the United States to a limitless number of contractual obligations of $999,999. Yet that is the apparent consequence of the court of appeals' logic.

b. In embracing that theory, the court of appeals relied on *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), and *Dougherty* v. *United States*, 18 Ct. Cl. 496 (1883), which the court construed to establish a "bright-line" rule that "[i]f more than one contractor is covered by an appropriation, the failure to appropriate funds sufficient to pay *all* such contractors does not relieve the government of liability." Pet. App. 31a-32a. In *Ferris*, a contractor hired by the Army to dredge a channel in the Delaware River was directed to halt work for five months; when the contractor was eventually permitted to resume work, he was soon ordered to stop again on the ground that the general appropriation from which the project was funded had been exhausted. 27 Ct. Cl. at 542-543. The Court of Claims ruled that the contractor was entitled to recover his lost profits for the five-month delay. *Id.* at 547. The court observed: "A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects." *Ibid.*

Similarly, in *Dougherty*, the claimant contracted with the Department of the Interior to deliver beef for the benefit of Indians. 18 Ct. Cl. 496. After the claimant performed, the Secretary refused to pay the entire agreed sum, arguing that the agency's general, lump-sum appropriation had been exhausted by other contracts. *Id.* at 503. The court rejected that contention, explaining that "persons contracting with the Government for partial service under general appropriations are [not] bound to know the condition of the appropriation account at the Treasury or the contract book of the Government." *Ibid.*

Ferris and *Dougherty* are inapposite. First, like this Court's decision in *Cherokee*, which cited both decisions (see 543 U.S. at 641, 643), *Ferris* and *Dougherty* involved government contracts made against the backdrop of unrestricted, lump-sum appropriations. See 2 *Red Book* 6-44 (describing both cases as concerning a contractor's right "to be paid from a general appropriation"); see also *Arctic Slope*, 629 F.3d at 1304 (discussing *Ferris*). Like *Cherokee*, therefore, *Ferris* and *Doughterty* involved the government's contractual liability for discretionary decisions by Executive Branch officials in allocating funds that Congress had appropriated without imposing any relevant statutory restriction.

The Court of Claims consequently had no need to decide in either case whether granting relief would violate an explicit statutory limitation on the use of public funds—or to confront the constitutional questions that would be implicated by holding that a contractor's mere lack of awareness of a statutory prohibition on withdrawing funds from the Treasury was sufficient to overcome an exercise of Congress's authority under the Appropriations Clause. Cf. *OPM* v. *Richmond*, 496 U.S. at 434 ("The rationale of the Appropriations Clause is that if individual hardships are to be remedied by payment of Government funds, it must be at the instance of Congress," such as through private bills). Indeed, in a subsequent case akin to *Dougherty*, this Court ruled that a contract to purchase beef for the benefit of Indians did *not* bind the United States where there was no appropriation available to support the contract. See *Jones*, 121 U.S. at 100 ("[N]o officer of the government was authorized to bind the United States by any contract for the subsistence of Indians not based upon appropriations made by Congress.").

Second, neither *Ferris* nor *Dougherty* involved a contract that was, by its terms, expressly made contingent on the availability of appropriations. As Judge Dyk explained in concluding that "the *Ferris* approach is inapplicable" under the ISDA, availability-of-appropriations clauses in government contracts evolved in part "to overcome the *Ferris* rule." *Arctic Slope*, 629 F.3d at 1304, 1303; see *C.H. Leavell & Co.* v. *United States*, 530 F.2d 878, 892 (Ct. Cl. 1976) (per curiam) (discussing history). This Court has consistently given effect to such clauses, see pp. 45-46, *supra*, and the express funding contingencies in the ISDA itself and in respondents' contracts by themselves provide a sufficient basis for reversing the court of appeals here.

Third, the rationale of *Ferris* and *Dougherty* is inapposite here on its own terms. The Court of Claims reasoned in those cases that the contractors were not barred from recovering because they had no reason to anticipate the insufficiency of funds in a general appropriation. See, *e.g.*, 27 Ct. Cl. at 546. In this case, by contrast, respondents have been well aware since at least FY 1994 of the insufficiency of the appropriations available to the Secretary to pay ISDA contract support costs, as their amended complaint makes clear. See J.A. 72. And as the complaint further acknowledges, beginning in 1993, the BIA annually "published and sent a notice to each contractor" (*ibid.*) describing the shortfalls in funding for contract support costs and the methodology that the agency would use to allocate the available money. Pet. App. 9a (collecting citations); see, *e.g.*, *Distribution of Fiscal Year 1994 Contract Support Funds*, 58 Fed. Reg. 68,694 (Dec. 28, 1993). The "very purpose" of these notices was to "warn[] tribal organizations of the

possibility of insufficient funding." Pet. App. 50a (Hartz, J., dissenting).

Indeed, the BIA has worked closely with affected tribes to develop policies that take account of the annual appropriations caps. In 2006, for example, with the "active participation" of affected tribes, the BIA developed a revised nationwide policy for the equitable distribution of funding for contract support costs in light of the recurring shortfalls. 2006 Policy 3. The agency maintains a joint working group with tribal representatives on matters related to ISDA contract support costs. See pp. 11-12, *supra*. And as required by the ISDA, the BIA has developed its annual budget requests—including any requests for additional contract support cost funding—in consultation with tribes. See 25 U.S.C. 450j-1(i). The inadequacy of available appropriations, in short, has been "no secret" to respondents. Pet. App. 49a (Hartz, J., dissenting). *Ferris* and *Dougherty* consequently provide no basis for respondents to recover against the United States.

c. Finally, as the Federal Circuit observed, *Ferris* and *Dougherty* are inapposite here for an additional reason: Section 450j-1(b) specifically relieves the Secretary of any obligation to make funds available to one contractor by reducing payments to others. See *Arctic Slope*, 629 F.3d at 1304. The Tenth Circuit reasoned that the Secretary is liable to each of the respondents under the *Ferris* principle because the Secretary could in theory have elected to pay any one contractor's entire claim. See Pet. App. 29a (asserting that "Congress capped *total* [contract support cost] spending, but this does not explain why Ramah, Oglala, Pueblo of Zuni, or any one contractor could not be paid [in] full"). But the ISDA provides that, "[n]otwithstanding any other provision" of the

Act, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this [Act]." 25 U.S.C. 450j-1(b).

The Secretary was therefore not obliged to provide funding for tribal contract support costs on a first-come, first-served basis, but had the authority to distribute the available money among all tribal contractors in an equitable fashion, as the BIA has done every year. See pp. 10-11, *supra*. The court of appeals acknowledged that allocating inadequate funds under a capped appropriation is inescapably a zero-sum endeavor: "the Secretary *necessarily* takes from one tribe to pay another whenever funding falls short of total need." Pet. App. 21a. Yet the court declared the government liable for all tribes' costs precisely because the Secretary *could* have paid the entire amount requested by any individual tribe or tribal organization, to the detriment of the others. See *id.* at 30a (asserting that "there is no statutory restriction that would preclude the Secretary from using appropriated funds to pay full [contract support cost] need to the individual contractors bringing suit"). Section 450j-1(b) frees the Secretary from favoring particular tribes in that manner by making clear that the Secretary may adopt an equitable mechanism for distributing among tribal contractors whatever sum Congress elects to appropriate in a given year.

C. The Judgment Fund Does Not Permit Litigants To Circumvent Appropriations Caps Imposed By Congress

Finally, the court of appeals reasoned that neither the Appropriations Clause nor the Anti-Deficiency Act was implicated by its decision because the Judgment Fund, see 31 U.S.C. 1304, is available to compensate respon-

dents for any shortfall in contract support costs resulting from the statutory appropriations caps. See Pet. App. 43a-47a. That conclusion is without merit.

The Judgment Fund is not a back-up source of agency appropriations. Nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury. As this Court explained in *OPM* v. *Richmond*, *supra*, "[t]he general appropriation for payment of judgments * * * does not create an all-purpose fund for judicial disbursement." 496 U.S. at 432. The Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interest and costs" when "payment is not otherwise provided for." 31 U.S.C. 1304(a). Here, Congress provided for the payment of respondents' ISDA contract support costs in the annual appropriations for the Department of the Interior. The restrictions that Congress imposed on those sums may not be circumvented by seeking additional amounts from the Judgment Fund. By virtue of the statutory caps on the availability of appropriations for contract support costs, the United States is not liable for any costs in excess of those caps. And because there is no liability, there is no basis for a judgment against the United States that could in turn be paid out of the Judgment Fund.

Nor, in any event, could Congress plausibly have intended for respondents to recover contract support costs in excess of the statutory caps from the Judgment Fund. Breach-of-contract actions under the ISDA are subject to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.* (formerly codified at 41 U.S.C. 601 *et seq.*). See 25 U.S.C. 450m-1(d). Although judgments against the government under the CDA are payable from the Judgment Fund, see 41 U.S.C. 7108(a) (Supp. IV 2010),

the CDA specifies that the Judgment Fund "shall be reimbursed * * * by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement." 41 U.S.C. 7108(c) (Supp. IV 2010). The Secretary plainly could not reimburse the Judgment Fund "out of available amounts" for judgments predicated on a *lack* of legally available funds. The "not to exceed" appropriations caps imposed by Congress would therefore be pointless, because the Secretary would have no choice but to return to Congress for additional appropriations to make up the shortfall.

The court of appeals acknowledged that "Congress likely did not intend to pay [contract support costs] from the Judgment Fund." Pet. App. 45a. But the court opined that "Congress passed the ISDA, guaranteeing funding for necessary [contract support costs], and its appropriations resulted in an on-going breach of the ISDA's promise." *Ibid.* That assertion encapsulates the error of the decision below. The ISDA does not "guarantee[]" to Indian tribes any particular level of federal funding, and Congress did not "breach" any "promise" by exercising its constitutional authority to control the payment of money from the Treasury.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 25 U.S.C. 450b, provides in pertinent part:

Definitions

For purposes of this subchapter, the term—

* * * * *

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.A. § 1601 *et seq.*], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

* * * * *

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this

subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided[1] the last proviso in section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * * *

(*l*) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

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[1] So in original. Probably should be "provided in".

2. 25 U.S.C. 450f, provides in pertinent part:

Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C.A. § 452 *et seq.*];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C.A. § 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C.A. § 2001 *et seq.*];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the

Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the con-

tract, as determined under section 450j-1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection,[1] if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

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[1] So in original. Probably should be "paragraph".

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under section 450j-1(a) of this title,

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 450j-1(a) of this title. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title.

* * * * *

3. 25 U.S.C. 450j(c), provides:

Contract or grant provisions and administration

Term of self-determination contracts; annual renegotiation

(1) A self-determination contract shall be—

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

* * * * *

4. 25 U.S.C. 450j-1, provides in pertinent part:

Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or ac-

tivity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall;—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) Reductions and increases in amount of funds provided

The amount of funds required by subsection (a) of this section—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

(c) Annual reports

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this

subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

* * * * *

(g) Addition to contract of full amount contractor entitled; adjustment

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * * * *

5. 25 U.S.C. 450*l*, provides in pertinent part:

Contract or grant specifications

(a) Terms

Each self-determination contract entered into under this subchapter shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

* * * * *

(c) Model agreement

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.

"(a) AUTHORITY AND PURPOSE.—

"(1) AUTHORITY.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*)

and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) are incorporated in this agreement.

"(2) PURPOSE.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) TERMS, PROVISIONS, AND CONDITIONS.—

"(1) TERM.—Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1)), the term of this contract shall be _____ years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

"(2) EFFECTIVE DATE.—This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the

Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

"(3) PROGRAM STANDARD.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

"(4) FUNDING AMOUNT.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

"(5) LIMITATION OF COSTS.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

* * * * *

"(c) OBLIGATION OF THE CONTRACTOR.—

"(1) CONTRACT PERFORMANCE.—Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) AMOUNT OF FUNDS.—The total amount of funds to be paid under this Contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) CONTRACTED PROGRAMS.—Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

* * * * *

"(f) ATTACHMENTS.—

* * * * *

"(2) ANNUAL FUNDING AGREEMENT.—

"(A) In general.—The annual funding agreement under this Contract shall only contain—

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, func-

tions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) INCORPORATION BY REFERENCE.—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

6. 25 U.S.C. 450m-1, provides in pertinent part:

Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secre-

tary to award and fund an approved self-determination contract).

* * * * *

(d) Application of Contract Disputes Act

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

* * * * *

7. 31 U.S.C. 1304(a), provides:

Judgments, awards, and compromise settlements

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

(1) payment is not otherwise provided for;

(2) payment is certified by the Secretary of the Treasury; and

(3) the judgment, award, or settlement is payable—

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

8. 31 U.S.C. 1341(a)(1)(A)-(B), provides:

Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

9. 41 U.S.C. 7108(a)-(c) [formerly codified at 41 U.S.C. 612], provides:

Payment of claims

(a) Judgments

Any judgment against the Federal Government on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board shall be paid promptly in accordance with the procedures contained in subsection (a).

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement.

10. Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 103-138, Tit. I, 107 Stat. 1390-1391 (FY 1994), provides in pertinent part:

> For operation of Indian programs * * * , $1,490,805,000, * * * *Provided further*, That not to exceed $91,223,000 of the funds in this Act shall be available for payments to tribes and tribal organizations for indirect costs associated with contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended, for fiscal year 1994 and previous years * * *
>
> * * * * *

11. Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, Tit. I, 108 Stat. 2511, provides in pertinent part:

For operation of Indian programs * * * , $1,526,778,000, of which not to exceed $95,823,000 shall be

for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts authorized by the Indian Self-Determination Act of 1975, as amended: *Provided*, That tribes and tribal contractors may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants or compact agreements * * *

* * * * *

12. Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321-170, provides in pertinent part:

> For operation of Indian programs * * * $1,384,434,000, of which * * * not to exceed $104,626,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau of Indian Affairs prior to fiscal year 1996, as authorized by the Indian Self-Determination Act of 1975, as amended * * *

* * * * *

13. Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009-192, provides in pertinent part:

> For operation of Indian programs * * * $1,436,902,000, of which * * * not to exceed $90,829,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau prior to fiscal year 1997,

as authorized by the Indian Self-Determination Act of 1975, as amended * * *

* * * * *

14. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, Tit. I, 111 Stat. 1554, provides in pertinent part:

> For operation of Indian programs * * * $1,528,588,000, * * * of which * * * not to exceed $105,829,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Bureau prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended * * *

* * * * *

15. Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681–245, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,584,124,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $114,871,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants,

compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 1999, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

16. Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106–113, 113 Stat. 1501A–148, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,670,444,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $120,229,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2000, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

17. Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106–291, Tit. I, 114 Stat. 934, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,741,212,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $125,485,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2001, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

18. Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 430, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,799,809,000, * * * of which * * * notwithstanding any other provision of law,

including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $130,209,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2002, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

19. Department of the Interior and Related Agencies Appropriations Act, 2003, Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 231, provides in pertinent part:

For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,857,319,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $133,209,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2003, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect

costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

20. Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, Tit. I, 117 Stat. 1256-1257, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,916,317,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $135,315,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2004, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *
>
> * * * * *

21. Department of the Interior and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 3055, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,955,047,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $136,314,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2005, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *
>
> * * * * *

22. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, Tit. I, 119 Stat. 513-514, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $1,991,490,000, * * * of which * * * not-

withstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $134,609,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2006, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect contract support costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

23. Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8-9, 27 (continuing resolution), provides in pertinent part:

"SEC. 101. (a) Such amounts as may be necessary, at the level specified in subsection (c) and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2006, for projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise provided for and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

* * * * *

"(4) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006.

* * * * *

(c) The level referred to in subsection (a) shall be the amounts appropriated in the appropriations Acts referred to in such subsection, including transfers and obligation limitations * * *

* * * * *

"SEC. 102. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

* * * * *

"SEC. 20515. Notwithstanding section 101, the level for 'Bureau of Indian Affairs, Operation of Indian Programs' shall be $1,984,190,000, * * *

* * * * *

24. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2008, Pub. L. No. 110-161, Div. F, Tit. I, 121 Stat. 2110, provides in pertinent part:

For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $2,080,261,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self- Determination Act of 1975, as amended, not to exceed $149,628,000 shall be available for payments for contract support costs as-

sociated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2008, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

25. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 713-714, provides in pertinent part:

For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $2,128,630,000, * * * of which * * * notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $147,294,000 shall be available for payments for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2009, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *

* * * * *

26. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2916, provides in pertinent part:

> For expenses necessary for the operation of Indian programs, as authorized by law, including * * * the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, * * * $2,335,965,000, * * * of which, notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $166,000,000 shall be available for payments for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 2010, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet contract support costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs * * *
>
> * * * * *

27. Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, Div. B, Tit. VII, 125 Stat. 102-103, 151, provides in pertinent part:

> "SEC. 1101. (a) Such amounts as may be necessary, at the level specified in subsection (c) and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2010, for projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for, and for which appropriations, funds, or

other authority were made available in the following appropriations Acts:

* * * * *

"(4) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (division A of Public Law 111–88)

* * * * *

"(c) The level referred to in subsection (a) shall be the amounts appropriated in the appropriations Acts referred to in such subsection, including transfers and obligation limitations * * *

* * * * *

"SEC. 1102. Appropriations made by section 1101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

* * * * *

"SEC. 1726. Notwithstanding section 1101, the level for "Department of the Interior, Bureau of Indian Affairs, Operation of Indian Programs" shall be $2,334,515,000: *Provided*, That the amounts included under such heading in division A of Public Law 111-88 shall be applied to funds appropriated by this division as follows: by substituting "$220,000,000" for "$166,000,000" * * *

* * * * *

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

MAR 19 2012

No. 11-551

IN THE

Supreme Court of the United States

KENNETH L. SALAZAR,
SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

RAMAH NAVAJO CHAPTER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Whether the United States breaches a contract when it agrees to pay a government contractor's full contract support costs but subsequently refuses to pay them solely on the ground that Congress placed a cap on the aggregate amount that could be spent for such costs for all contractors, although the United States did not include a specific cap on costs in any individual contract and Congress's appropriation was more than adequate to pay the costs of each individual contractor.

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STATUTORY PROVISIONS INVOLVED

Section 450j-1(g) of Title 25 provides:

> Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

Additional statutory provisions are reproduced in the appendix to Petitioners' Brief.

STATEMENT

After receiving the benefit of the bargain, the Secretary of the Interior declined to pay Respondents in full because the Secretary had over-committed himself to pay other contractors. For 120 years, it has been settled law that, when the government signs too many contracts and consequently runs out of money, it must nevertheless fulfill its contractual promises, just like any other contracting party. The risk of over-commitment falls on the government, which over-extended itself, and not on the contractors, which abided by the terms of their contracts. This is the *Ferris* doctrine, which has endured for well over a century, which Congress has never statutorily modified, and which this Court recently reaffirmed in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005). There is no reason to chart a different course now.

Indeed, this venerable rule makes perfect sense and has given contractors the necessary confidence that they will be paid by the agency or made whole in court. After all, a contractor cannot be expected to

know the condition of an appropriation on the agency's books or what the agency plans to do with its money. Without this rule, it would be madness to contract with the government, which would have unfettered discretion to over-commit and then breach with impunity, paying whomever it wants and short-changing the rest, all without judicial recourse.

The Court should reject the government's imprudent effort to overturn the *Ferris* doctrine and shift the risk of nonpayment to the contractor. There is no serious dispute that the government promised to pay the contracts in full, as this Court already held. *Id.* at 643. Nor is there a dispute that the tribal contractors fully performed. All that is left is whether the government must uphold its end of the bargain. Because the Tenth Circuit correctly held that the government is liable, the decision below should be affirmed.

I. THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT.

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450 *et seq.* (ISDA), directs the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) to enter into contracts with Indian Tribes and tribal organizations. §450f(a)(1). Under these "self-determination contract[s]," the agencies provide funds in exchange for the Tribes' agreement to administer federal programs, such as health care or law enforcement. *Id.* The underlying purpose of these contracts is to promote "greater tribal self-reliance," *Cherokee*, 543 U.S. at 639, by allowing Tribes to provide services to their members, thereby eliminating the "Federal domination of Indian service programs [that] has served to retard ... the realization of [tribal] self-government." §450(a)(1).

Despite this undeniably laudable goal, for decades the BIA and IHS have underpaid tribal contractors. In response, Congress twice amended the ISDA, limiting the agencies' discretion and clarifying the terms of the contracts. Because this history bears on the question presented, and because the government has once again asserted that the tribal contracts are not real contracts, contrary to this Court's holding in *Cherokee*, we describe the history below.

A. The Enforceable Nature Of ISDA Contracts.

After enactment of the ISDA in 1975, lower courts held that agreements entered into under the statute were not enforceable contracts. See Pub. L. 93-638, 88 Stat. 2203 (1975); *Busby Sch. of the N. Cheyenne Tribe* v. *United States*, 8 Cl. Ct. 596 (1985). Accordingly, Congress amended the Act in 1988, and then again in 1994, to make clear that ISDA contracts are true "contracts." Pub. L. 103-413, 108 Stat. 4250 (1994); Pub. L. 100-472, 102 Stat. 2286 (1988). The Act now "uses the word 'contract' 426 times to describe the nature of the Government's promise," and as this Court recognized in *Cherokee*, "the word 'contract' normally refers to 'a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'" 543 U.S. at 639; see S. Rep. 100-274, at 34-35 (1987) (intent to overrule *Busby*).

Congress also made clear that ISDA contracts are fully enforceable under the Contract Disputes Act, 41 U.S.C. §§7101-7109. 25 U.S.C. §450m-1(d). Congress thus "afford[ed] self-determination contractors the procedural protections now given other federal contractors by that Act." S. Rep. 100-274, at 35. Contractors may recover "monetary awards" against the government on contract claims, 41 U.S.C. §§7107,

7108, and such awards must "be paid promptly" from the Judgment Fund, 31 U.S.C. §1304. 41 U.S.C. §7108(a).

Moreover, Congress gave ISDA contractors even greater rights to enforce their contracts than are held by other government contractors. ISDA contractors may file actions for "money damages arising under contracts" and "injunctive relief" directly in district courts. 25 U.S.C. §450m-1(a).

B. The ISDA's Contract Support Cost Provisions.

Under the original Act, the agency was required to pay a contractor no less than the amount the agency would have spent on the direct costs of running the contracted program (the "secretarial" amount). Pub. L. 93-638, §106(h), 88 Stat. at 2211-12. But the Act did not address indirect costs that contractors incurred in administering the contracted programs. See 25 U.S.C. §450b(c), (f) (defining "direct costs" and "indirect costs"). Indirect costs include fixed overhead expenses, such as utilities, rent, audits, and salaries of administrative staff. See Cibinic & Nash, *Formation of Government Contracts* 1343 (3d ed. 1998).

The reimbursement of indirect costs is a standard feature of government contracts. *E.g., Rumsfeld* v. *United Techs., Corp.*, 315 F.3d 1361, 1363-64 (Fed. Cir. 2003). The Office of Management and Budget (OMB) has established uniform standards that agencies use in determining the indirect costs reimbursable under contracts performed by States, localities, and Tribes. OMB Circular A-87, 2 C.F.R. pt. 225. These standards, cited in the ISDA regulations, 25 C.F.R. §900.45, generally require determining an "indirect cost rate," which is multiplied against the se-

cretarial amount to yield the indirect costs. *Id.*; *Cherokee*, 543 U.S. at 635.

Because of the 1975 Act's silence regarding indirect costs, the agencies routinely under-reimbursed contractors in the early years following the ISDA's enactment. This forced "tribal contractors to absorb all or part of such indirect costs" using the contract funds intended to pay for the direct program costs, "thus reducing the amount available to provide services to Indians as a direct consequence of contracting." S. Rep. 100-274, at 33. Following years of hearings, Congress concluded that "the single most serious problem with implementation of the Indian self-determination policy has been the failure of the [BIA] and the [IHS] to provide funding for the indirect costs associated with self-determination contracts." *Id.* at 8.

Congress therefore amended the ISDA in 1988 to require payment of indirect costs as part of an amount referred to as "contract support costs." Pub. L. 100-472, §205, 102 Stat. 2285, 2292-94 (1988). Congress mandated that "[u]pon the approval of a self-determination contract ... the Secretary shall add the indirect cost funding amount awarded for a self-determination contract to the amount awarded for direct program funding." *Id.*, §205(g), 102 Stat. at 2294 (enacting §450j-1(g) (1988)). Congress adopted these changes to "insure that ... the tribal contractor will realize the *full amount* of direct program costs and indirect costs to which the contractor is entitled." S. Rep. 100-274, at 31 (emphasis added).

Nonetheless, the agencies continued to underpay contract support costs, which led Congress in 1994 to clarify yet again the government's obligation to pay these costs. Pub. L. 103-413, 108 Stat. 4250 (1994). The Act now provides that "there shall be added to

the [secretarial] amount ... contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on ... to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. §450j-1(a)(2). These contract support costs "shall include" certain direct costs not already included in the secretarial amount, together with "any additional" indirect costs incurred by the contractor. §450j-1(a)(3)(A)(i), (ii). The amount of funds that the contractor "is entitled to receive" in any given year is determined through annual funding agreements, which incorporate indirect cost rates negotiated in accordance with OMB's standards. §450j-1(a)(3)(B); see §450j(c)(2) (providing for annual renegotiations); §450b(g) (defining "indirect cost rate"); §450*l*(c), sec. 1(f)(2) (incorporating annual funding agreements into Model Contract).

Congress also rewrote subsection §450j-1(g) of the ISDA to emphasize that "[u]pon the approval of a self-determination contract, the Secretary shall add to the contract *the full amount of funds* to which the contractor is entitled under [§450j–1(a)]." §450j-1(g) (emphasis added). To drive the point home, Congress provided that regardless of any "shortfall [that] is the result of lack of full indirect cost funding," the agencies may not "fund less than the full amount of need for indirect costs associated with a self-determination contract." §450j-1(d).

Because ISDA contracts, like many other government contracts, are to be entered into prior to the start of the fiscal year, the statute provides that payments are "subject to the availability of appropriations." §450j-1(b). This language, common in government contracts, "makes clear" that if the contract is negotiated before a fiscal year begins, it "will not become binding unless and until Congress appro-

priates funds for that year." *Cherokee*, 543 U.S. at 643. Once Congress makes appropriations sufficient to cover the contract, however, the availability-of-appropriations condition is fulfilled, *id.*, and the agency "shall make available to the Contractor the total amount specified in the annual funding agreement," §450*l*(c), sec. 1(b)(4); *see id.*, sec. 1(b)(6)(B)(i) (same).

C. The 1994 Regulatory Limitation And Model Contract.

In adopting the 1994 amendments, Congress also expressed frustration that it took the BIA and IHS "[n]early six years" to propose regulations that "were ... intended to permit both departments to ... eliminate deficiencies or problem areas which inhibited contracting." S. Rep. 103-374, at 3 (1994). Worse, the proposed regulations "'raise[d] new obstacles and burdens for Indian tribes.'" *Id.* Congress therefore prohibited the agencies from issuing any regulations concerning contract support costs and other matters, 25 U.S.C. §450k(a)(1), and from imposing on contractors any nonregulatory "guidelines, manuals or policy directives" concerning contract funding, §450*l*(c), sec. 1(b)(11).

Further curtailing the Secretary's discretion, Congress set forth a Model Contract in the statute and instructed the Secretary to use that contract verbatim. The contract may be supplemented, but it cannot be supplanted, by annual funding agreements. §450*l*(c), sec. 1(f)(2). It incorporates by reference the entirety of the ISDA, §450*l*(c), sec. 1(a)(1), and each contract must be "liberally construed for the benefit of the Contractor." §450*l*(c), sec. 1(a)(2).

Most relevant here, the Model Contract directs that contractors are to receive full funding of their con-

tract support costs. It provides in section 1(b)(4) that "the Secretary *shall make available* ... the total amount specified in the annual funding agreement," and "[s]uch amount *shall not be less than* the applicable amount determined pursuant to [§450j-1(a)]" for the secretarial amount and contract support costs. §450*l*(c), sec. 1(b)(4) (emphases added); see *Cherokee*, 543 U.S. at 639.

II. THE APPROPRIATIONS ACTS.

This case concerns the BIA's failure to pay full contract support costs for contracts spanning fiscal years ("FY") 1994 to 2001. For FY 1994, Congress appropriated roughly $1.5 billion for all BIA activities, including activities administered by tribal contractors. Pub. L. 103-138, 107 Stat. 1390, 1390-91 (1993). Of this gross amount, Congress provided that "not to exceed $91,223,000 ... shall be available" to pay "indirect costs associated with contracts" under the ISDA. *Id.* Every year since, Congress included similar "not to exceed" language in BIA appropriations with regard to "contract support costs." Pet. Br. 8-9 (citing Acts). Congress also included such language in IHS appropriations starting in FY 1998. *E.g.*, Pub. L. 105-83, 111 Stat. 1543, 1582-83 (1997). Beginning with FY 1999, Congress added before the statutory cap, "notwithstanding any other provision of law, including but not limited to the [ISDA]." *E.g.*, Pub. L. 105-277, 112 Stat. 2681, 2681-245 (1998).

III. FACTUAL BACKGROUND.

A. The Bureau Of Indian Affairs' Contract Payment Practices.

Between 1994 and 2006, the BIA published annual Federal Register notices, addressed to BIA personnel, three to seven months *after* the fiscal year began and *after* work on the contracts commenced, addressing

possible shortfalls. *E.g.*, 62 Fed. Reg. 1468 (Jan. 10, 1997). The notices stated that some percentage of each contractor's previous year's contract support costs—typically 75%—would be paid to that contractor shortly, and that final payment would await further calculations. *Id.* at 1469. The notices also stated that *if* the appropriation proved insufficient, BIA personnel would endeavor to distribute the remaining funding *pro rata* across all contractors. *Id.* Around the last month of the fiscal year—or even after its close—the BIA made a second payment of contract support costs. Pet. 13a. In each year at issue, most contractors were not paid in full. Pet. 8a.

In May 2006, the notices ceased, and the BIA announced that it would no longer make *pro rata* payments. BIA, National Policy Memorandum, NPM-SELFD-1, *Contract Support Costs* 13-17 (May 8, 2006). Instead, the BIA would first pay contractors the same amount of contract support costs (if any) that they were paid in the preceding year. *Id.* at 13. Then, the BIA would attempt to allocate any increased appropriation to the most severely underfunded contractors. *Id.* However, the BIA's implementation of the new system was inconsistent, and since FY 2007 BIA payments to contractors have varied widely, with many contractors underpaid, some fully paid, and others even *over*paid. See, *e.g.*, U.S. Dep't of Interior, *Report to Congress on Funding Requirements for Contract Support Costs of Self-Determination Awards for Fiscal Year 2009* (2010) (contractor payments ranging from no contract support costs at all ("0.00%") (*id.* at 4, 18) to overpay-

ments as high as "249.63%" (*id.* at 13)).[1] The BIA approach mirrors the approach employed by the IHS for many years, with similar variations. See IHS, *Indian Health Manual* pt. 6, ch. 3 (2007) (IHS contract support policy); IHS, *Fiscal Year 2010 CSC Funding Data* (2009) (contractor payments ranging from "0.00%" (*id.* at 4, 10) to "7.68%" and "30.30%" (*id.* at 10) to overpayments as high as "197.57%" (*id.* at 13) and even "352.00%" (*id.* at 10)).[2]

Although the Act requires the Secretary during each fiscal year to report to Congress on any contract support funding shortfalls, 25 U.S.C. §450j-1(c), the BIA's annual reports were never timely submitted during the fiscal year. Many were never submitted at all. Cir. J.A. 240-56. Nor did the BIA ever ask Congress for the full amount required to pay all contract support costs. *E.g.*, J.A. 208-21.

B. Underpayments To Respondents.

During the years at issue, Respondents contracted with the United States to administer programs that the BIA would otherwise have administered. Pet. 10a, 13a. These programs included law enforcement, courts, education assistance, land management, probate assistance, natural resource services, employment assistance, child welfare assistance, emergency youth shelters, and juvenile detention services. *E.g.*, J.A. 89-95; Cir. J.A. 891-927.

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[1] http://www.ncai.org/fileadmin/contract_support/2012/BIA_FY_2009_CSC_Shortfall_Report_to_Congress_-_2009_data__11-18-2010_.pdf.

[2] http://www.ncai.org/fileadmin/contract_support/2012/IHS_FY_2010_CSC_Shortfall_Report_-_FINAL_2009_data.pdf.

Each contractor entered into the ISDA's Model Contract, supplemented by annual funding agreements. Pet. 11a; see, *e.g.*, J.A. 87, 102, 120. Like all self-determination contracts, these contracts incorporate the ISDA and provide that the contracts should be "'liberally construed for the benefit of the contractor.'" Pet. 15a; *e.g.*, J.A. 103.

The accompanying annual funding agreements obligated the agency to pay a mathematically determinable amount of contract support funds. *E.g.*, J.A. 97, 120-23; *infra* 20-21. The BIA never paid these amounts. For fiscal years 1994 to 1999, for example, Oglala was underpaid a total of $1,928,983 in contract support funds. Cir. J.A. 258. During this same period, Ramah was underpaid a total of $1,040,918. Cir. J.A. 272.[3] The inadequate payments of contract support funds have greatly impaired the contractors' abilities to provide governmental services. See J.A. 197-98.

IV. PROCEEDINGS BELOW.

A. District Court Proceedings.

In 1990, Respondent Ramah Navajo Chapter (a political subdivision of the Navajo Nation) filed a class action to challenge the BIA's process for setting indirect cost rates. J.A. 9, 48-56. After certifying the class, the district court granted defendants summary judgment, but the Tenth Circuit reversed, holding that the BIA's indirect cost rate process was flawed. *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997). The parties subsequently settled the gov-

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[3] Respondent Pueblo of Zuni's contract and related documents are not of record because the Pueblo intervened after discovery closed. J.A. 139.

ernment's liability for these claims for 1989 to 1993. *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999).

In 1999, the district court permitted Ramah to amend its class complaint to add the breach of contract claim at issue. J.A. 68-74. At that time, the court also allowed Respondent Oglala Sioux to intervene. J.A. 75-80. (The Pueblo of Zuni intervened in 2002. J.A. 139.) Respondents alleged that the government "failed to pay additional required amount[s]" of contract support costs, J.A. 75-76, and sought "money damages for breach," J.A. 75.

In 2001, the parties filed cross motions for summary judgment on the claims relating to years for which Congress had capped appropriations for contract support costs (FY 1994 and following). Pet. 13a-14a. Proceedings on the motions were delayed pending the litigation that led to this Court's decision in *Cherokee*, 543 U.S. 631. J.A. 34; Pet. 94a, 102a. There, this Court held that the IHS breached its ISDA contracts by failing to pay full contract support costs. Despite *Cherokee*, however, the district court entered summary judgment for the government. According to the court, *Cherokee* was distinguishable because the appropriations statutes in *Cherokee* did not include a "not to exceed" clause. Pet. 102a, 105a-106a.

B. The Court of Appeals Decision.

The Tenth Circuit reversed, relying on "three principles set down by" this Court. Pet. 17a. First, because the contract support appropriation was a lump-sum for all contractors, it did not "'impose legally binding restrictions'" on distribution, and the Secretary was thus not required to distribute the funds *pro*

rata. Pet. 17a, 19a-20a (quoting *Lincoln* v. *Vigil*, 508 U.S. 182 (1993)).

Second, "there is no merit to the 'claim that, because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors.'" Pet. 17a, 22a (quoting *Cherokee*). The several hundred other contractors dealing with the Secretary in addition to Ramah, Oglala, and Zuni "are not a single conglomerated entity simply because each lays claim to a portion of the same appropriation any more than all federal highway contractors represent a single, undifferentiated mass." Pet. 21a-22a. The court of appeals majority cited the "venerable" opinion in *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), to underscore that "'[a] contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.'" Pet. 22a (quoting *Ferris*).

Third, as *Cherokee* concluded, "'if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds.'" Pet. 17a, 24a (quoting *Cherokee*). The risk of overcommitment falls on the government.

Relying on these principles, the court of appeals held that the government must fulfill its contractual commitments or answer in money damages. Rejecting the government's argument that "the 'not to exceed' language" allows the government to breach with impunity, the court explained that the clause did not distinguish the appropriations in *Cherokee*. In both

instances, the appropriation "'establishe[d] a maximum that may not be exceeded,'" and in both, funds were legally available for each contract. Pet. 27a-28a.

Finally, the court held that *Cherokee* foreclosed the government's argument under the Appropriations Clause. Pet. 45a-46a. As *Cherokee* recognized, when an appropriation is fully spent without paying a contractor its due, a damages remedy lies, and payment is congressionally authorized in the Judgment Fund Act, 31 U.S.C. §1304. Pet. 45a-46a.

SUMMARY OF ARGUMENT

1.a. This is a basic contract case. The government entered into contracts with the Tribes, all of whom performed their end of the bargain. The government, however, refused to pay in full, contending it did not have the money. Because the government is treated like any other party when it enters into a contract, it breached the contracts and is liable for damages.

b. The government argues, for the first time in this Court, that it was never obligated to pay the Tribes' full contract support costs, but only "an amount" that it saw fit to pay. Even if this new argument were not waived, it is meritless. In multiple provisions, the ISDA and the Model Contracts unambiguously establish that the Secretary is obligated to pay "the full amount of [contract support] funds to which the contractor is entitled." 25 U.S.C. §450j-1(g); see §§450j-1(a)(2), 450j-1(d)(2), 450*l*(c), sec. 1(b)(4). Moreover, the government's novel interpretation would render the contracts illusory, with payment subject to the government's whim.

c. It is no defense that Congress failed to appropriate sufficient funds to cover all of the agency's contractual commitments. For over 120 years, it has been settled law that an agency is bound to its con-

tractual promises regardless of whether Congress appropriated enough money to cover all of the agency's contracts. See *Ferris*, 27 Ct. Cl. 542; *Dougherty* v. *United States*, 18 Ct. Cl. 496 (1883). Having been repeatedly and consistently reaffirmed and never questioned or modified by Congress, this *Ferris* doctrine is a bedrock principle of government contract law. Indeed, in *Cherokee*, the Court cited *Ferris* four times in rejecting the government's claim (reprised here) that "tribes, not the Government, should bear the risk" of insufficient funds. 543 U.S. at 640; see also *id.* at 637, 641, 643. As the Court held, the contractor is "'entitled to payment even if the agency ... assumes other obligations that exhaust the funds.'" *Id.* at 641 (emphasis omitted). The *Ferris* doctrine's sole exception—for line-item appropriations that address a single contractor—is inapplicable.

2.a. The government is wrong in arguing that, because Congress imposed statutory caps on the BIA appropriations, *Ferris* is distinguishable. Indeed, *Ferris* itself involved an appropriation with a statutory cap, one which the GAO has determined is identical to the caps at issue here. Any distinction is imaginary.

Moreover, even if (contrary to fact) *Ferris* and its progeny did not involve caps, the government's argument would still fail. The government bears a heavy burden of showing that Congress intended to disturb the 120-year-old bedrock principle of government contract law that the risk of over-commitment falls on the agency, not the contractors. The mere use of the commonplace "not to exceed" clause does not suffice. The clause limits what the agency can spend out of an appropriation on contract support costs, thereby protecting other funds for other purposes, but it neither bars creation of a contract obli-

gation nor limits a contractor's remedies for breach, including recovering damages from the Judgment Fund. Congress gave no indication it sought to displace *Ferris* or to restrict access to the Fund.

The government's construction is especially implausible because it would allow the government to breach with impunity, and would fatally undermine a central purpose of the ISDA, which Congress amended specifically to correct the BIA's "past failure" to pay indirect costs and "to require payment of those costs in the future." *Cherokee*, 543 U.S. at 639. Indeed, the government's position requires drawing the untenable conclusion that the statutory caps on appropriations impliedly amended the ISDA around the same time that Congress actually amended the statute to make clear that the agencies must pay "full" contract support costs. Especially considering Congress's direction that any ambiguity must be construed in favor of the Tribes, the government's argument is untenable.

b. The government is also mistaken in claiming that the Judgment Fund, which satisfies the Appropriations Clause, is unavailable. Congress expressly directed ISDA contractors to recover damages from the Fund, 41 U.S.C. §7108(a); 25 U.S.C. §450m-1(d), and this Court in *Cherokee* recognized the Fund's availability. 543 U.S. at 643.

c. There are plenty of steps Congress could have taken if it truly wanted to shortchange the Tribes. For instance, Congress could have amended the ISDA to remove the agencies' statutory mandate to enter into binding contracts. Or, it could have enacted true line-item appropriations for individual contractors, which would have given contractors clear notice that they would receive only specified amounts before performing the contracts. That Congress did not take

these steps or others, see *infra* §II.C, only underscores that the Tribes are entitled to payment.

3. The government's claim that the insufficient appropriation excuses its breach also fails for a separate reason: The Secretary never even tried to obtain sufficient appropriations from Congress, as required by the ISDA, settled government contract law, and the implied covenant of good faith and fair dealing. *S.A. Healy Co.* v. *United States*, 576 F.2d 299, 300-05 (Ct. Cl. 1978); *Centex Corp.* v. *United States*, 395 F.3d 1283, 1304-05 (Fed. Cir. 2005). In all events, because the government received the full benefit of the contractual bargain, it must live up to its promises.

ARGUMENT

I. THE GOVERNMENT IS LIABLE FOR BREACHING ITS CONTRACTUAL OBLIGATIONS TO PAY FULL CONTRACT SUPPORT COSTS.

Under basic principles of contract law and the 120-year-old *Ferris* doctrine, the government is liable for breach of contract. The Secretary failed to pay a portion of the contract support costs despite having received the full benefit of the bargain. Because (1) the government is treated like any other party when it enters into a contract, (2) the contracts at issue require payment of full contract support costs, and (3) government over-commitment is not a defense to breach, the decision below should be affirmed.

A. When The Government Enters Into A Contract, It Is Treated Just Like Any Other Party And Is Liable For Breach.

As an initial matter, there should be no dispute that the government has, in fact, entered into contracts. This Court recognized in *Cherokee* that self-

determination contracts are fully enforceable contracts, just like any other government procurement contract. *Cherokee*, 543 U.S. at 637. Indeed, the ISDA "uses the word 'contract' 426 times to describe the nature of the Government's promise." *Id.* at 639 (citing Restatement (Second) of Contracts §1 (1981)); see also 25 U.S.C. §450*l*(c) (Model Contract).

Nor should there be any dispute that, when the government enters into such a contract, it is treated like any other contracting party. As this Court has repeatedly affirmed, "'[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Franconia Assocs.* v. *United States*, 536 U.S. 129, 141 (2002) (quoting *Mobil Oil Exploration & Producing Se., Inc.* v. *United States*, 530 U.S. 604, 607 (2000)); see also *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 (1996) (plurality opinion) (same); *Cherokee*, 543 U.S. at 639. This is because "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." *Lynch* v. *United States*, 292 U.S. 571, 580 (1934). Were the government free to avoid its contractual obligations, "the certain result" would be to "undermine[] the Government's credibility at the bargaining table and increas[e] the cost of its engagements." *Winstar*, 518 U.S. at 884 (plurality opinion).

It is thus no surprise that "Congress ... meant to treat alike promises made under the [ISDA] and ordinary contractual promises." *Cherokee*, 543 U.S. at 639. Consequently, when the government breaches a self-determination contract, the Tribe may recover damages. Restatement (Second) of Contracts §346(1) (1981). The amount of damages is the "sum of money that will, to the extent possible, put [the Tribe] in as

good a position as [it] would have been in had the contract been performed." *Id.* §347 cmt. a. Congress explicitly authorized adjudication of claims for "money damages" in accordance with the Contract Disputes Act and appropriated funds for their payment through the Judgment Fund. 25 U.S.C. §450m-1(a), (d).

B. The Self-Determination Contracts Obligated The Government To Pay The Contractors' Contract Support Costs In Full.

Because the government must be treated like any other contracting party, it cannot escape its obligation to pay the Tribes their full contract support costs. That obligation is unambiguously spelled out in both the ISDA and the self-determination contracts.

1. Starting with the ISDA, §450j-1(a)(2) unmistakably provides that there "*shall be added*" to the secretarial amount "contract support costs," which "*shall consist* of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. §450j-1(a)(2) (emphases added). Likewise, the Act requires that "[u]pon the approval of a self-determination contract, the Secretary *shall add* to the contract *the full amount* of funds to which the contractor is entitled under [§450j-1(a)]," which, as noted, specifically includes contract support costs. §450j-1(g) (emphasis added). Further, in a section added to counteract the habitual underpayments of these costs, the Act states that, regardless of any past shortfalls, the agencies may not "fund less than *the full amount of need* for indirect costs associated with a self-determination contract." §450j-1(d)(2) (emphasis added); see S. Rep. 100-274, at 37-38. Read to-

gether, these provisions—which Congress specifically added to correct the government's "past failure" to pay indirect costs and "to require payment of those costs in the future,"[4] *Cherokee*, 543 U.S. at 639—"require[] that the Secretary provide funds for *full* administrative costs to the tribes." *Thompson* v. *Cherokee Nation*, 334 F.3d 1075, 1081 (Fed. Cir. 2003) (emphasis added), *aff'd sub nom. Cherokee Nation* v. *Leavitt*, 534 U.S. 631; see also *Cherokee*, 543 U.S. at 634 ("The Act specifies that the Government *must* pay a tribe's costs, including administrative expenses.") (emphasis added).

Consistent with these statutory provisions, the ISDA's Model Contract—which every self-determination contract must incorporate, 25 U.S.C. §450*l*(a)(1)—provides that the Secretary "shall make available ... the *total amount* specified in the annual funding agreement," §450*l*(c), sec. 1(b)(4), which "*shall not be less than* the applicable amount determined pursuant to [§450j-1(a)]." *Id.* (emphasis added). The annual funding agreements, in turn, obligate the Secretary to pay mathematically determinable amounts of contract support funds.

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[4] As the Senate Report states: "Under [the Act], a tribal contractor may secure relief ... , including orders that require the offending agency to pay amounts required by the plaintiff's contract." S. Rep. 100-274, at 34. These "strong remedies" for "compelling BIA and IHS compliance with the [Act]" are "required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law." *Id.* at 37; *see also id.* (warning that "[s]elf-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs").

Ramah's annual funding agreement for FY 2000 is illustrative. In a section titled "Funding and Payments," it provides that the "amount of Indirect Cost Funding shall be based upon the Contractor's Indirect Cost Agreement which is applicable to this period of performance." J.A. 99. The agreement then specifies a precise amount of "Indirect Costs," $1,173,684, which is based on an indirect cost rate of 86.4% applied to the direct base amount. J.A. 97. This is the "total amount" that the Secretary was obligated to pay.[5] Other annual funding agreements similarly identify contract support cost amounts, whether by specifying an amount, *e.g.*, J.A. 123, specifying the indirect cost rate, *e.g.*, Cir. J.A. 1489, or specifying that an indirect cost rate will be set according to the OMB standards. In all agreements, however, contract support costs equal a determinable amount that is based on the Tribe's actual costs and that does not vary according to Congress's appropriation.

2. Notwithstanding the plain language of the ISDA and the contracts, the government argues that it was never obligated to pay the full amount of reasonable contract support costs, but only "'an amount'" that the government decides to pay in its "equitabl[e]" discretion. Pet. Br. 10, 37. This argument, which was not made below and is therefore waived, *e.g.*, *United*

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[5] The annual funding agreement notes that the indirect cost rate for FY 2000 had not been finalized yet, J.A. 97, as this rate results from the OMB's rigorous audit process in which the contractor explains how it allocates overhead costs among particular programs. *See* OMB Circular A-87; 25 C.F.R. pt. 900, subpt. F. Subsequent adjustments to indirect cost rates are commonplace in government contracts, and these adjustments do not limit the contractor's right to full reimbursement.

States v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001), is dumbfounding.

First, as explained, the statute does not speak merely of "an amount" but uses the phrases "full amount" and "total amount," words which would have no meaning if the government could just pick any amount it wanted to pay in its discretion. Moreover, as Ramah's annual funding agreement illustrates, the contracts provide for a mathematically determinable amount. That is the amount owed by the government.[6]

Second, the government's novel interpretation would render the self-determination contracts illusory. An agreement in which the payor has discretion as to the amount of payment is not a contract at all. See 1 Richard A. Lord, *Williston on Contracts* §4:27 (4th ed. 2011) ("[W]here the promisor retains an unlimited right to decide later the nature or extent of his or her performance[, the] unlimited choice in effect destroys the promise and makes it illusory." (footnote omitted)); accord *Winstar*, 518 U.S. at 913 (Breyer, J., concurring) ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." (quoting *Murray* v. *Charleston*, 96 U.S. 432, 445 (1878))). Congress's use of the word "contract" 426 times was not meant to create an illusion.

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[6] Contrary to the government's claim (Pet. Br. 37), §450j-1(a)(3) speaks of "eligible costs," not to limit their full funding, but to identify the costs that can "receiv[e] funding under [the ISDA]." Such costs "*shall* include" particular types of direct and indirect costs specified in the statute (emphasis added). These costs are allowed in §450j-1(k) and OMB Circular A-87, 2 C.F.R. pt. 225, app.A, and are typical in government contracting.

Accordingly, this Court and others have declined interpretations that would permit the government to set the terms of its own performance. For example, in *Detroit* v. *Detroit Citizens' Street Railway*, the Court dismissed as "hardly ... credible" the city's suggestion that a fare rate agreed to with a railroad company, which "amounted to a contract," could be "subject to change from time to time by the sole decision of the [city] council." 184 U.S. 368, 384 (1902); see also, *e.g.*, *Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489, 493 (1923) (contract to supply coal was not enforceable because of a provision stating that "the Government [was] not ... obligated to order any specific quantity") (emphasis omitted); *Torncello* v. *United States*, 681 F.2d 756, 769 (Ct. Cl. 1982) (rejecting notion that government promise to use contractor "for all of its pest control work" included possibility that government "could give [the contractor] none").

Yet, according to the government, it has "equitable" discretion to choose "an amount" as low as zero—which is what the government has sadly paid some contractors, see *supra* 9-10.[7] Were the government's position correct, it would be "'madness'" for contractors to enter into such agreements with the government. *Winstar*, 518 U.S. at 863 (plurality opinion).

Third, the government's position would render this Court's decision in *Cherokee* a meaningless intellectual exercise with no practical consequence. If the

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[7] The government's claim that the "Secretary was required to allocate" funds "equitably," Pet. Br. 10, is refuted by *Lincoln* v. *Vigil*, 508 U.S. at 192 (Secretary has unreviewable discretion), and belied by the Secretary's abandonment of *pro rata* distribution and by his actual, inequitable practice.

government has freedom to pay whatever "amount" it wants (*pro rata* or otherwise), there was no shortfall requiring this Court's (or any court's) attention. *Cherokee* was litigated for a reason, however, and that reason was that the government had entered into real contracts with real obligations. The government has no basis to argue now that the Secretary has the discretion to pay a lesser "amount."

At the very least, the statutes in question are ambiguous. Indeed, the government itself has conceded that it is "at a minimum ... reasonable" to conclude that the agency is liable for failing to pay on its contracts. Cir. J.A. 1660; see also Cir. J.A. 1673 ("defendants might be held liable for plaintiff's contract support costs despite the inclusion of the [availability] clause in their contract").[8]

Any such ambiguity must be resolved in Respondents' favor. Congress has expressly mandated that the ISDA and self-determination contracts "be liberally construed for the benefit of the Contractor." 25 U.S.C. §450*l*(c), sec. 1(a)(2); see also *Neal & Co.* v. *United States*, 19 Cl. Ct. 463, 471-73 (1990) (holding that, because the government drafted the contracts, ambiguities are construed against it, just like any other drafter). Further, reflecting the "'unique trust relationship between the United States and the Indians,'" this Court has held that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Mon-*

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[8] The government made this admission in litigation over the government's duty to enter into ISDA contracts in the first place. *S. Ute Indian Tribe* v. *Sebelius*, 657 F.3d 1071 (10th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3431 (Dec. 19, 2011) (No. 11-762).

tana v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Accordingly, Respondent's construction of the contracts and ISDA, which the government concedes is "reasonable," must be accepted over the government's competing position.

3. Equally meritless is the government's claim that four provisions of the ISDA show that contractors are not "guarantee[d] ... *any* particular level of federal funding." Pet. Br. 38 (citation omitted) (emphasis added). Three of the government's four provisions recite the customary government-contract clause stating that the contract is "subject to the availability of appropriations." *Id.* at 38-41 (citing 25 U.S.C. §§450j(c)(1), 450j-1(b), 450*l*(c)). In *Cherokee*, this Court explained that this clause is a *timing* provision that affects *when* the contract becomes binding, not how much money a party is owed:

> This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year. It also makes clear that a Government contracting officer lacks any special statutory authority needed to bind the Government without regard to the availability of appropriations.

543 U.S. at 643 (citations omitted). The Court stressed that the clauses do *not* give the government "the legal right to disregard its contractual promises" by changing the amount it pays once the contracts are in effect. *Id.* at 643-44. Provided Congress enacts an appropriation covering the contract—thereby making the appropriation legally available, see *infra* 31-34—the contract is binding, and the government cannot shortchange the contractor.

There is no reason to reach a different result here. Indeed, as noted, if the government had complete discretion concerning what to pay the Tribes, the contracts would cease being contracts at all, despite Congress's repeated use of the word "contract" and its express mandate that these agreements be fully enforceable. Considering that Congress clearly intended to remedy the agencies' past failure to reimburse indirect costs and "to *require* payment of those costs in the future," *Cherokee*, 543 U.S. at 639 (emphasis added), the government's argument fails.[9]

The government's fourth provision actually undermines its position. Pet. Br. 39. Section 450j-1(c) requires the Secretary to submit mid-year, annual reports to Congress specifying, among other things, "any deficiency in funds needed to provide required contract support costs to all contractors." 25 U.S.C. §450j-1(c)(2). Congress did not ask to be informed about mere "requested" contract support costs. It understood that contract support costs are determinate sums "*required*" to be paid under the ISDA and the contracts; hence the deficiency.

Moreover, Congress has demonstrated elsewhere that it knows how to use clear, precise language when it intends funding to vary according to appropriations. See, *e.g.*, 25 U.S.C. §2008(j)(2) (providing advance notice that, if total amount of all eligible Tribes' administrative cost needs exceeds appropriated funds, "the Secretary shall reduce the amount of" each Tribe's administrative cost funding "by [a *pro*

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[9] The government's reliance on 25 U.S.C. §450j(c) is also misplaced for another reason: This provision plainly refers to multi-year contracts, which are not at issue here. *See* H.R. Rep. 93-1600, at 29 (1974); *infra* 45 n.16 (discussing same).

rata] amount"). No remotely comparable language exists in the ISDA.

4. Finally, the government seeks refuge in a single, irrelevant line in a single annual funding agreement. Pet. Br. 44-45. The "Billing" section of the Oglala FY 2000 funding agreement instructs the contractor preparing invoices to multiply its indirect cost amounts by the "'percentage of rate funded by BIA.'" *Id.* (quoting J.A. 132). According to the government, this provision proves that the parties "'recognized that contract support costs might not be fully paid.'" *Id.*

But the provision merely recognizes that the BIA pays out contract support costs in multiple distributions, not one single lump sum. Thus, the agreement specifies that the BIA will pay the Tribe an *initial* allocation of $29,459, reflecting 75% of the Tribe's expected contract support cost requirements for FY 2000, with the *balance* to "be added as soon as it becomes available subject to congressional appropriation." J.A. 123. Certainly, such language does not mean that the Tribe has agreed to forfeit the remaining 25%. Indeed, the contract elsewhere confirms that "[t]he Contractor is to be reimbursed for *all* allocable and allowable indirect costs incurred in performance of this contract, subject to any statutory limitations applicable." J.A. 132 (emphasis added). At most, the provision reflect ambiguity, which must be construed in favor of the Tribes. See 25 U.S.C. §450*l*(c), sec. 1(a)(2).

In any event, no annual funding agreement can supplant the Model Contract, which incorporates the ISDA and its full-funding obligation. §450*l*(a), (c), sec. 1(f)(2). Thus, the Oglala agreement cannot be read as vesting the agency with discretion to pay only a portion of contract support costs. See also *MAPCO Alaska Petrol., Inc.* v. *United States*, 27 Fed. Cl. 405,

416 (1992) ("The contractor cannot, by waiver, permit the Government to enter an illegal contract."), *abrogated on other grounds by Tesoro Haw. Corp.* v. *United States*, 405 F.3d 1339 (Fed. Cir. 2005); *LaBarge Prods., Inc.* v. *West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995); *Seldovia Vill. Tribe*, 03-2 BCA ¶32,400 (ICBA 2003).[10]

C. The Government Is Liable For Breach Even If Appropriations Are Insufficient To Cover All Of Its Contracts.

For over a century, it has been settled law that an agency is bound to its contractual promises regardless of whether Congress has appropriated enough money to cover all of the agency's contracts. The only qualification to this rule is that the appropriation must be large enough to pay the particular contract in dispute. So long as the appropriation equals or exceeds that particular contract, funds are legally available for the contract, and the government must honor its obligations, even if the appropriation is inadequate to pay all the agency's contracts taken together.

1. This bedrock rule derives from an 1892 Court of Claims case, *Ferris* v. *United States*, 27 Ct. Cl. 542. In *Ferris*, the contractor contracted with the U.S. Army Corps of Engineers to dredge a portion of the Delaware River for $37,000, to be paid out of a larger congressional appropriation for the improvement of the river. Before the contractor could complete the project, however, the Corps of Engineers ordered him to stop, because the larger appropriation had been exhausted. *Id.* at 545-46. The contractor sued for

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[10] Of course, there is no argument that the Oglala contract compromises the rights of other Tribes.

damages and prevailed. Rejecting the government's argument that exhaustion of the appropriation excused payment, the court explained:

> A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; *but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.*

Id. at 546 (second emphasis added). Thus, the contractor was entitled to recover his damages. *Id.* at 547.

The court's decision in *Ferris* flowed directly from its decision in *Dougherty* v. *United States*, 18 Ct. Cl. 496. In *Dougherty*, a meat merchant agreed to supply beef to the Department of the Interior under a contract to be paid from a general appropriation for subsistence of certain Indian Tribes. After the merchant completed performance, the Department discovered it had exhausted the appropriation through other contracts, and refused to pay. *Id.* at 502-03. The merchant sued, and, as in *Ferris*, the government defended on the ground of insufficient appropriations.

The court squarely rejected this argument, stating, "we have never held that persons contracting with the Government for partial service under general appropriations are bound to know the condition of the appropriation account at the Treasury or on the contract book of the Department. To do so might block

the wheels of the Government." *Id.* The court then explained: "The statutory restraints in this respect apply to the official, but *they do not affect the rights in this court of the citizen honestly contracting with the Government.*" *Id.* (emphasis added). Depletion of the appropriated funds may have terminated the contracting official's authority to make further payments on the contract, but it did not excuse the agency's liability for breach on a fully performed contract.

The rationale for this rule is that "a contractor cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund." *Ross Constr. Corp.* v. *United States*, 183 Ct. Cl. 694, 699 (1968). In such cases, the risk that an agency might not have enough money lies instead with the government, for the contractor cannot be expected to know how much of the appropriation remains available at any given time. "A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well." 2 GAO, *Principles of Federal Appropriations Law* 6-45 (3d ed. 2004) (hereinafter "GAO Redbook").

In the 120 years since *Ferris*, the rule has become a foundation of government contract law untouched by any subsequent congressional action. In case after case, the Court of Claims and its successor courts have consistently and expressly reaffirmed that exhaustion of a general appropriation does not relieve an agency from liability for breach of contract. See, *e.g.*, *Ross Constr.*, 183 Ct. Cl. at 699; *N.Y. Airways, Inc.* v. *United States*, 177 Ct. Cl. 800, 811 (1966) (per curiam); *Lovett* v. *United States*, 104 Ct. Cl. 557, 582 (1945), *aff'd*, 328 U.S. 303 (1946); *Whitlock Coil Pipe Co.* v. *United States*, 71 Ct. Cl. 759, 761-62 (1931); see also *Wetsel-Oviatt Lumber Co.* v. *United States*, 38

Fed. Cl. 563, 570 (1997); *N.Y. Cent. R.R.* v. *United States*, 65 Ct. Cl. 115, 128 (1928), *aff'd*, 279 U.S. 73 (1929); *N.Y. Cent. & Hudson River R.R.* v. *United States*, 21 Ct. Cl. 468, 473 (1886); 2 U.S.C. §622(2) (distinguishing between authority to obligate and expenditure); cf. *Viacom, Inc.* v. *United States*, 70 Fed. Cl. 649, 657 (2006).

Scholars, too, recognize that exhaustion of an appropriation does not discharge the government's liability for breach. See, *e.g.*, Alan I. Saltman, *The Government's Liability for Actions of Its Agents That Are Not Specifically Authorized: The Continued Influence of* Merrill *and* Richmond, 32 Pub. Cont. L.J. 775, 824 (2003); Kenneth Michael Theurer, *Sharing the Burden: Allocating the Risk of CERCLA Cleanup Costs*, 50 Air Force L. Rev. 65, 126 (2001); see also Nash & Cibinic, Cherokee Nation*: More Than Meets the Eye*, 19 Nash & Cibinic Report ¶29 (2005).

Indeed, the GAO Redbook, the federal government's own comprehensive and authoritative summary of federal funding law, verifies the *Ferris* doctrine's enduring place at the center of government contract law. This Court and others frequently rely on the Redbook as an "'expert opinion[]'" that courts should "prudently consider." *Thompson*, 334 F.3d at 1084; see *Cherokee* 543 U.S. at 643 (citing Redbook); *Lincoln* v. *Vigil*, 508 U.S. at 192 (same); *Republic Nat'l Bank of Miami* v. *United States*, 506 U.S. 80, 90 (1992) (plurality opinion) (same); see also *Int'l Union, United Auto Workers* v. *Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.).

According to the GAO, "it is *settled* that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted." 2 GAO Redbook 6-44 (emphasis added). Thus,

> Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts.

Id.; see, *e.g.*, *Lanier Bus. Prods.*, No. B-187969, 1977 WL 12991, at *4 (Comp. Gen. May 11, 1977).

The GAO further explains that the "legal availability" of funds for a project paid out of a general appropriation does not turn on whether the appropriation is large enough to cover *all* expenditures authorized by that appropriation. Rather, the inquiry turns on whether the particular "obligation and expenditure" at issue is "within the amounts Congress has established" (and whether its "purpose" is "authorized" and its occurrence "within the time limits applicable"). 1 GAO *Redbook* 4-6 (the time-purpose-amount rule). Thus, in *Newport News Shipbuilding & Dry Dock Co.*, the Comptroller General found that the full amount of an appropriation to build two ships was "legally available" to be spent on just one, even though spending the full amount on one would leave no money for the other. 55 Comp. Gen. 812, 821-22 (1976).

Congress has never modified, much less overturned, the *Ferris* rule in the 120 years that it has been a centerpiece of government contract law. If the fundamental default rule should be changed now, it should be changed by Congress alone.

2. This Court's decision in *Cherokee* confirmed that *Ferris* is controlling law. Citing *Ferris* four times, *Cherokee* expressly rejected the argument that "mu-

tual self-awareness among tribal contractors" that potential appropriations might not suffice to pay all contract support costs shifts the risk of insufficient funds from the government to the contractors. 543 U.S. at 640. The Court also cited *Ferris* to explain when funds are "availabl[e]" so as "to bind the Government." *Id.* at 643. And, consistent with *Ferris*, the Court held that the contractors were entitled to the full amount of their costs because Congress had "appropriated sufficient legally unrestricted funds to pay the contracts at issue." *Id.* at 637. That the Secretary allocated the appropriated funds to other uses was immaterial, given that, as the government itself admitted, "'if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds.*'" *Id.* at 641 (some emphasis added) (quoting Br. for Fed. Parties 23 (Sept. 3, 2004)). Exhaustion of an appropriation, this Court made clear, is not a defense to breach.

3. The one exception to this firm rule lies in cases in which the entire appropriation is insufficient to cover the *single* contract in dispute. In such cases, the contractor may properly be held to know that the agency is not obligated to pay the contract's total amount because the contractor need only compare the amount of the appropriation against the amount of the contract to know whether the government will be able to pay. See *Dougherty*, 18 Ct. Cl. at 503. Thus, the GAO instructs that when funding comes, not from a general appropriation for multiple contracts, but rather from a specific line-item appropriation restricted to a single project, "[e]xhaustion of the appropriation will generally bar any further recovery beyond that limit." 2 GAO Redbook 6-45; see *Sutton*

v. *United States*, 256 U.S. 575, 577-79 (1921) ($20,000 appropriation for dredging proved insufficient to pay the sole contractor); *Bradley* v. *United States*, 98 U.S. 104, 111-12 (1878) (line-item appropriation to pay a post office lease); see also *Hooe* v. *United States*, 218 U.S. 322, 333 (1910); *Shipman* v. *United States*, 18 Ct. Cl. 138, 146 (1883).

This case, however, involves a general appropriation, not a line-item appropriation. For each fiscal year at issue, Congress appropriated a lump sum for *all* contractors' contract support costs, without restricting or specifying particular amounts for particular contractors. The funds are thus "unrestricted" in the *Ferris* and *Cherokee* sense. *Cf. Cherokee*, 543 U.S. at 640 (citing *Ferris* and holding that that the government "should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay *all* contractors"). Indeed, at times, the appropriations committees contemplated line-item appropriations for specific contractors, but each time chose not to include them. H.R. Rep. 107-234, at 122 (2001) (Conf. Rep.) ("As in past years, there is no specific earmark for any individual tribe for contract support costs."). Under *Ferris*, then, because this case involves a lump-sum rather than a line-item appropriation, the insufficiency of the appropriation to pay *all* Tribes is immaterial. Because Congress appropriated enough unrestricted funds to pay each contract, the government remains liable.

II. THE STATUTORY CAP DOES NOT EXCUSE THE GOVERNMENT'S BREACH.

Despite the plain terms of the ISDA and over 120 years of foundational government contract law, the government nevertheless contends that it is free to breach these contracts with impunity. According to the government, because Congress imposed statutory

caps on the appropriations to the BIA, Congress intended to allow the BIA to renege on contracts after over-committing itself, to render the Judgment Fund unavailable, and to prevent the contractors from obtaining any judicial redress. For several reasons, this argument fails.

A. The Government's Position Contradicts 120 Years Of Government Contract Law.

1. The government tries to avoid the well-established *Ferris* doctrine by claiming that the appropriations in *Ferris* and *Dougherty* did not contain statutory caps. Pet. Br. 49. This distinction is fictitious.

Contrary to the government's suggestion, the appropriation in *Ferris* provided a capped amount for a particular purpose, stating: "For improving [the] Delaware River below Bridesburg, Pennsylvania, forty-five thousand dollars." Act of Mar. 3, 1879, ch. 181, 20 Stat. 363, 364; see *Ferris*, 27 Ct. Cl. at 544. The *Dougherty* appropriation followed the same formulation.[11] As the GAO instructs, this formulation ("for" followed by a purpose and an amount) has the "same effect" as "[w]ords like 'not more than' or 'not to exceed.'" 2 GAO Redbook 6-28 to -29. There is, therefore, no difference between the caps in *Ferris* and *Dougherty* and the caps at issue here.

Likewise, the appropriations at issue in *Cherokee* were also capped. The FY 1995 appropriation, for instance, stated: "For expenses necessary to carry out ...

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[11] Although *Dougherty* does not identify the appropriations act at issue, 18 Ct. Cl. 496, examination of the *Dougherty* case file indicates that the appropriation was likely: "For subsistence of [certain] Indians ... , three hundred thousand dollars." Act of Mar. 3, 1875, ch. 132, 18 Stat. 420, 423.

the [ISDA], the Indian Health Care Improvement Act, and [several other laws], $1,713,052,000." Pub. L. 103-332, 108 Stat. 2499, 2527-28 (1994); see *Cherokee*, 543 U.S. at 637. That appropriation restricted agency expenditures to a sum certain ($1,713,052,000), just as the appropriations here restricted contract support costs to a sum certain.[12] Indeed, except for a handful of appropriations for indefinite amounts, such as the Judgment Fund, virtually all appropriations are capped, because Congress generally does not write blank checks. Nonetheless, for 120 years, courts have held that these caps do not shift the risk of agency over-commitment to the contractor.

Moreover, there is no logical basis for distinguishing among the caps. Whether the cap is on the type of expenditure (as here), the type of project (as in *Ferris*: "improving the Delaware River"), or the agency as a whole (as in *Cherokee*), the cap limits appropriations just the same. In all three instances, the statutorily limited, lump-sum amount is sufficient to pay the contract at issue but insufficient to pay all of the commitments covered by the appropriation. Accordingly, in each situation, the long-settled rule has been that the contractor is not charged with knowing whether the agency has exhausted the appropriation

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[12] To be sure, the statutory caps produce one difference from the *Cherokee* appropriations, in that IHS was free in *Cherokee* to reprogram funds to pay the contract support costs fully (and not fund other commitments and priorities), 543 U.S. at 641, whereas that option ended once contract support funds were separately earmarked. It was in connection with the reprogramming option that the *Cherokee* petitioners addressed the "not to exceed" earmark. Pet. Br. 27. But it remains true that both cases involve caps and, within the capped appropriation, funds are legally available to pay each individual contract.

by paying other contractors. See 2 GAO Redbook 6-45; *e.g.*, *N.Y. Airways*, 177 Ct. Cl. at 811 (applying *Ferris* in context of earmarked appropriation for contract subsidy to be paid to multiple air service contractors); *Schuler & McDonald, Inc.* v. *United States*, 85 Ct. Cl. 631, 642 (1937) (awarding damages for breach even though "'available cash'" under "'roads and trails appropriation'" had been "'completely exhausted'"); *N.Y. Cent. & Hudson River R.R.*, 21 Ct. Cl. at 469, 473 (applying *Dougherty* in context of a "'special appropriation'" of $150,000 for "'obtain[ing] proper facilities from the great trunk lines of railroads for the railway post-office service'"). Regardless of the type of cap, the contractor's ability to assess whether the agency has mismanaged its funds or otherwise over-committed or overspent is identical; and the agency, not the contractor, bears all of these risks. See, *e.g.*, 2 GAO Redbook 6-45.

2. In any event, even if *Ferris*, *Dougherty*, and their progeny did not involve capped appropriations akin to the cap at issue here (and they clearly did), the government's argument that Congress shifted the risk to the contractors would still fail. The government bears a heavy burden of showing that Congress intended to disturb the 120-year-old bedrock principle of government contract law that the risk of over-committing funds falls on the agency. Indeed, "Congress will be presumed to have legislated against the background of our traditional legal concepts." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978); see, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-85 (1988). And, the "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank* v. *N.J. Dep't of Envtl. Prot.*, 474

U.S. 494, 501 (1986). The expression of intent needed to change course should be even more clear where, as here, the background law has existed for well over a century and has supplied a foundation for government contracting, an area in which "uniform interpretation of similar language" is paramount, *Cherokee*, 543 U.S. at 644.

Congress gave no indication, however, that it intended to depart from *Ferris*'s foundational principle that the risk of over-commitment remains with the agency. The mere use of the words "not to exceed" *does not suffice. That is a commonplace formulation* for capping appropriations, signals nothing about the rights of contractors to recover damages in a lawsuit for breach, and says nothing about the availability of the Judgment Fund to pay those damages. With these three words, Congress did not signal that it sought to unsettle government contract law and to undermine the century-old protections that *Ferris* has provided contractors. The clause simply limits the BIA's use of appropriations, thereby protecting funding for non-contracting Tribes, see, *e.g.*, Pet. Br. 19, 28 (*recognizing that clause serves this purpose*), but it does not limit contractors' rights to damages for breach. Likewise, the "notwithstanding" clause that Congress started adding to appropriations in FY 1999 does not change the result, and no one is arguing that it does. *E.g.*, Pub. L. 105-277, 112 Stat. at 2681-245. Limiting only the BIA's use of appropriations, that clause does not purport to transform government contract law, overturn *Ferris*, authorize breach, and *preclude all damages remedies.*

This Court should be especially reluctant to impute special meaning into these generic words in the appropriations statutes considering the extreme consequences of such a shift. If, as the government as-

serts, the statutory caps allow the Secretary to pay whatever "equitable distribution" he wants (whether *pro rata* or otherwise), it would be "'madness'" for contractors to enter into future agreements. *Winstar*, 518 U.S. at 863 (plurality opinion). "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Id.* at 913 (Breyer, J., concurring) (quoting *Murray*, 96 U.S. at 445). Contractors would be at the whim of the agency.

Finally, the government's position would fatally undermine one of the central purposes of the ISDA. As this Court recognized in *Cherokee*, the Act "reflects a congressional concern with Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future." 543 U.S. at 639. Under the government's logic, however, at the same time that Congress sought to address the Government's failures to reimburse Tribes, and "to require" future payment of contract support costs, it simultaneously began to vest the BIA with unfettered discretion *not* to pay those same contract support costs.[13] That simply makes no sense.

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[13] The first two statutory caps (for FY 1994 and 1995) were adopted in November 1993 and September 1994. Pub. L. 103-332, 108 Stat. at 2511; Pub. L. 103-138, 107 Stat. at 1390-91. Even at that time, the ISDA's full-funding obligation was clear. *See* Pub. L. 100-472, §205(g), 102 Stat. at 2294 (adding §450j-1(g) (1988)) ("the Secretary *shall add* the indirect cost funding amount" (emphasis added)). Then, just a month after enacting the FY 1995 cap, Congress passed the 1994 ISDA amendments, which underscored the full-funding obligation, requiring use of the Model Contract and mandating that "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled." Pub. L. 103-413, §102(g), 108 Stat. at 4259; 25 U.S.C. §450j-1(g); *see supra* 5-8.

Indeed, the government's position requires drawing the implausible conclusion that the statutory caps on appropriations impliedly amended the ISDA. This position "surely do[es] violence to the 'cardinal rule ... that repeals by implication are not favored.'" *TVA* v. *Hill*, 437 U.S. 153, 189 (1978) (omission in original). According to this rule, a repeal "'will not be presumed unless the intention of the legislature to repeal'" is "'clear and manifest.'" *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009); see also *Georgia* v. *Pa. R.R.*, 324 U.S. 439, 456-57 (1945). The rule "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," which has "the limited and specific purpose of providing funds for authorized programs." *TVA*, 437 U.S. at 190.

Assuredly, Congress did not effect an implied repeal of the ISDA when it passed the appropriations at issue. At the very least, the statute is ambiguous, and as such, it must be construed in favor of the contractor. See *supra* 24-25.

3. Unaided by the statutory text, the government turns to legislative history. But, even if the legislative history behind an appropriations statute could ever impliedly and unambiguously repeal substantive law—and it cannot, see *TVA*, 437 U.S. at 191 ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress ...."); *Cherokee*, 543 U.S. at 646 ("restrictive language contained in Committee Reports is not legally binding")—the history here does not come close.

Rather, the appropriations committee reports are, at best, ambiguous and reflect varying intentions regarding the statutory caps. Some reports indicate that the capped amounts were expected to "fund fully contract support costs." H.R. Rep. 103-158, at 55

(1993); see also S. Rep. 103-114, at 52 (1993) (with first cap "the Committee believes the program should be adequately funded to avoid shortfalls in [FY] 1994").

Other statements acknowledge that there could be a shortfall in contract support funding, but explain that the caps were simply imposed to ensure that funds were available to provide services to non-contracting Tribes, since without the cap, such funds could be reprogrammed to pay contract support costs. S. Rep. 103-294, at 57 (1994); see H.R. Rep. 103-299, at 28 (1993) (Conf. Rep.).[14] Committee members expressed a similar intention when they added language to the statutory cap providing that it applied "notwithstanding any other provision of law, including but not limited to the [ISDA]," *e.g.*, Pub. L. 105-277, 112 Stat. at 2681-245 (1998). See H.R. Rep. 105-609, at 57 (1998) ("[w]ithout a ceiling on contract support, the Bureau could be required to reprogram from other tribal programs").

Of course, a desire to protect federal services for non-contracting Tribes does not translate into an intent to shortchange contracting Tribes and to deprive them of all judicial redress, including access to the Judgment Fund. To the contrary, various committee reports acknowledged that the ISDA "implies a 100 percent funding requirement" for contract support costs, and that the caps therefore leave the government "vulnerable to litigation." H.R. Rep. 106-406, at

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[14] This concern for protecting non-contracting Tribes became more serious after this Court's 1993 decision in *Lincoln* v. *Vigil*, 508 U.S. 182, which confirmed that the Secretary had complete discretion to alter or rescind non-contractual tribal programs funded under a general appropriation.

137 (1999) (Conf. Rep.); see also H.R. Rep. 103-551, at 56-57 (1994) (acknowledging risk of "future claims"). Most importantly, nowhere in the legislative history did Congress say that it sought to overturn *Ferris* and 120 years of bedrock government contract law, to allow the government to breach with impunity, to render the contracts illusory, and to undercut the very ISDA protections that it enacted at the same time it passed the appropriations statutes. Legislative history cannot bear the weight the government's argument places on it.

4. The government's other reasons to depart from *Ferris* are equally unavailing.

a. The government cites the Antideficiency Act, but its predecessor statutes were present when *Dougherty* and *Ferris* were decided. 2 GAO Redbook 6-34 to -35. As those cases explained, the Antideficiency Act's requirements of an appropriation "apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government." *Dougherty*, 18 Ct. Cl. at 503; *Ferris*, 27 Ct. Cl. at 546 (appropriation "merely imposes limitations upon the Government's own agents" and does not "cancel its obligations, nor defeat the rights of other parties"). The Act has been consistently construed ever since. *Supra* §I.C; 2 GAO Redbook 6-44 (while the "Antideficiency Act may prevent the agency from making any further payments," the contractor's rights "will remain enforceable in the courts"). Moreover, the contracts were binding and authorized by the ISDA. See Pet. 44a. Thus, regardless of any duties the Secretary has under the Act, it does not impair the contractor's express rights under the ISDA to sue for breach and to obtain damages "in the courts." *Id.* And, again, Congress has never modified the An-

tideficiency Act in the face of those long-standing and authoritative interpretations of its language.

b. Next, the government once again returns to an argument that this Court rejected in *Cherokee*. According to the government, it does not owe the Tribes their contract support costs because of the ISDA's routine "subject to the availability of appropriations" clause. But, as discussed, *supra* 25-26, *Cherokee* made clear that this language does not bestow on the government "the legal right to disregard its contractual promises." 543 U.S. at 644. Instead, the clause is a timing provision that was satisfied once Congress enacted these appropriations statutes. *Id.* at 643.

The availability clause does not remotely "overcome the *Ferris* rule." *Contra* Pet. Br. 50. To the contrary, *Cherokee* cited *Ferris* in explaining what the clause actually means. As *Cherokee* stated, the clause clarifies that an agency lacks "special statutory authority to bind the Government without regard to the availability of appropriations." 543 U.S. at 643 (citing *Ferris*). That truism, however, plays no role in this case because, again, appropriations were legally available for each contract. *Contra* Pet. Br. 32.[15]

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[15] The government's fleeting reference (Pet. Br. 50) to *C.H. Leavell & Co.* v. *United States*, 208 Ct. Cl. 776 (1976) (per curiam), is inapposite. *Leavell* involved a multi-year contract that repeatedly stated that the contractor was not to proceed with work in later years unless and until it received written notice that the contracting officer had sufficient funds, and further stated that absent such notification the government would "in no case [be] liable" for a shortfall. *Id.* at 805-08. The contractor then received advance notice. The case turned on the express language of the contract, which is nothing like the availability clause at issue here. *Winston Bros. Co.* v. *United States*, 130 F. Supp. 374 (Ct. Cl. 1955), which the government cited below but not to this Court, is in accord. *Id.* at 376-78 (multi-year con-

Indeed, not even the government believes its argument. Elsewhere, the government concedes that the availability clause makes no difference. Pet. Br. 31. According to the government, the clause is actually "'unnecessary'" because, with or without the clause, an agency does not have "'implied direct spending authority.'" *Id.* The clause is no excuse to disregard *Ferris*.

c. The government next relies on the principle that "the United States cannot be bound in contract by agents acting without actual authority." *Id.* at 33. According to the government, the Secretary lacked actual authority (despite ISDA §§450f(a)(1)) because the appropriation was insufficient to cover all contractors' contract support costs. Pet. Br. 32-34. But this is nothing more than a direct assault on *Ferris*.

Further, none of the cases cited by the government (*id.* at 33-35) contradicts *Ferris* or supports the government's assertion. Most of the cited cases deal with a line-item appropriation for a single contractor, and in that situation, it is reasonable to require the contractor to bear the risk. See *Sutton*, 256 U.S. at 582; *Hooe*, 218 U.S. at 333; *Bradley*, 98 U.S. at 115-16; see also *supra* 33-34 (contrasting *Ferris* with cases in which the appropriation is inadequate to pay the single contract). Other cases rejected claims because there was no applicable appropriation at all. *St. Louis Sw. Ry.* v. *United States*, 262 U.S. 70, 72 (1923) (rejecting the plaintiff's claim for payment for delivering parcels because he had no contract nor were there any appropriations for the period in question); *Ree-*

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tract, advance notice, and express release of liability); *see also* 3 GAO Redbook 13-187; *infra* note 16. In any event, *Cherokee* controls, and *Cherokee*'s treatment of *Ferris* confirms that *Ferris* is not "overcome."

side v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850) (holding, before Congress enacted the Judgment Fund, that a judgment of indebtedness could not be paid absent an appropriation by Congress).[16] And, in *United States* v. *Jones*, 121 U.S. 89 (1887), the Court denied payment both because there was no applicable appropriation, and because Congress had never authorized the contracts in the first place. *Id.* at 99, 101 ("the contract on its face shows that it was made with reference to appropriations to be thereafter made," and Congress never "suppl[ied] the want of authority ... to contract, in behalf of the United States, for the subsistence of the Indians in advance of the ratification of the treaties negotiated with them").[17]

There is no case cited by the government or found by Respondents in which any court has ever held that, when an appropriation is sufficient for the contract at issue but insufficient for all of the agency's commitments, the agency can avoid its contractual obligations solely on the ground that it lacked actual authority to over-commit itself.[18] That is no surprise

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[16] *Leiter* v. *United States*, 271 U.S. 204 (1926), turned on the related principle that when a contract for multiple years is "entered into under an appropriation available for but one fiscal year," the contract "is binding on the Government only for that year." *Id.* at 206-07. This issue is not present here because annual funding agreements last for only one year.

[17] *See also Hensley* v. *United States*, 7 U.S. Cong. Rep. C.C. 189 (Ct. Cl. 1859), *available at* 1859 WL 5367, at *11-12 (holding agent lacked authority to execute contracts at issue in *Jones*, *see* 121 U.S. at 96-97 (referring to *Hensley*)).

[18] Of course, an agent may lack actual authority to enter into a contract for reasons besides insufficient appropriations, such as the contract not meeting regulatory requirements. *E.g.*, *Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-84 (1947). Those

because the rationale for this "actual-authority" rule is entirely inapposite. In other contexts, actual authority is required because "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler* v. *Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 63 (1984); see, *e.g.*, *Merrill*, 332 U.S. at 384-85 ("Regulations were binding on all who sought to come within the [Act], regardless of actual knowledge of what is in the Regulations"); *Whiteside* v. *United States*, 93 U.S. 247, 257 (1876) ("ignorance of the law furnishes no excuse").

But, as this Court recognized in *Cherokee*, and as the Court of Claims recognized in *Ferris* and *Dougherty*, it makes no sense to expect contractors to know what an agency is doing with its own money. See *supra* §I.C; 2 GAO Redbook 6-45. There is no "law" to consult, only facts wholly within the agency's control. Thus, *Cherokee* rejected the claim that "the tribe should bear the risk that a total lump-sum appropriation (though sufficient to cover its own contract) will not prove sufficient to pay *all* similar contracts." 543 U.S. at 638.

Indeed, not even the government is willing to follow the logic of its own argument. On the government's theory, a self-determination contract that obligates the government to pay in excess of the appropriation "would be without legal effect" as an "*ultra vires* promise." Pet. Br. 32. This would mean that the earlier-signed contracts that *did not* push the agency's collective obligations beyond the appropriation pose no problem; it is only later-signed contracts that push

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cases are inapposite because the government's only defense here is insufficiency of appropriations.

the Secretary's obligations beyond the cap that would be invalid. Yet, the government does not believe that the earlier-signed contracts should be paid in full or that the later-signed contracts are invalid and worthless. Instead, the government invokes the agency's over-commitment as a license to force *all* contractors to take a haircut (sometimes *pro rata*, sometimes *pro bono*, sometimes something else) in the agency's sole discretion. Neither the government's actual-authority argument, nor any of the cases the government cites, supports this novel approach. Rather, the correct approach is the one that courts have followed for over 120 years: The risk of over-commitment falls on the agency, not the contractor, and thus the government's breach is fully compensable.

d. The government is also mistaken in contending that the tribal contractor's "aware[ness]" of "the insufficiency of the appropriations" should bar recovery. Pet. Br. 49-50. This too was argued and squarely rejected in *Cherokee*. See Br. for Fed. Parties 25 ("all Tribes also are fully aware that there is a threshold allocation of funds"); *id.* at 12-13 (IHS allocated funds "in consultation with the Tribes"); *Cherokee*, 543 U.S. at 638-39. There is no basis for reversing course today. Neither *Ferris* nor *Cherokee* nor any case in between turned on a factbound, contractor-by-contractor assessment of what each contractor actually knew and when. Instead, the rule is simple and straightforward: "'A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration ....'" *Id.* at 637-38 (quoting *Ferris*, 27 Ct. Cl. at 546).[19]

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[19] Nor does it matter that the contractors brought suit as a class. To be sure, the appropriated funds for contract support were insufficient to cover all of the class members' claims. But

At any rate, the incomplete notices the BIA provided cannot possibly excuse the Secretary's breach. It is "hornbook law" that the government, like any other party to a contract, is not free simply to announce its intention not to perform and then walk away. *La.-Pac. Corp.* v. *United States*, 656 F.2d 650, 652 (Ct. Cl. 1981). Rather, when a party gives notice that it intends not to perform, the party "repudiates" the contract and thereby becomes liable for damages for breach. See Restatement (Second) of Contracts §§250, 253; see also *Mobil Oil*, 530 U.S. at 608. Moreover, as a practical matter, the actual payment notices did not arrive until near the end—or even after the close—of the fiscal year, by which point the contractors had already fully performed or close to it.[20] Since 2006, the agencies have provided no notice and instead have adopted a system under which some contractors are fully paid, some are partially paid, and some receive nothing at all. *Supra* 9-10. Thus, no contractor has any way of knowing whether or not it will be fully paid (or even *over*paid) until after it has performed, regardless of any prior "consultation" with the government.

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the *Ferris* doctrine requires that individual contractors' claims be treated individually. And the fact that the contractors have elected the procedural device of a class action cannot "'abridge'" their "'substantive right[s].'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting Rules Enabling Act, 28 U.S.C. §2072(b)).

[20] A party's anticipatory repudiation triggers the other party's duty to mitigate damages, which in turn affects the amount of damages to be recovered. Restatement (Second) of Contracts §350 cmt. b. The government is not, however, asserting that its notices repudiated the contract nor that Respondents failed to mitigate damages—nor that the result differs for years in which no notice issued.

e. The government's final attempt to avoid the *Ferris* doctrine rests upon 25 U.S.C. §450j-1(b), which provides that the "'Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization.'" Pet. Br. 51-52. According to the government, this provision is an affirmative grant of discretion to the Secretary that "frees" him to "adopt ... equitable mechanism[s] for distributing among tribal contractors whatever sum Congress elects to appropriate in a given year." *Id.* at 52. This reading is utterly implausible, however, in light of the numerous provisions Congress added to the ISDA to foreclose the Secretary's claims of discretion over contract support cost distribution. *Supra* 5-8.

Moreover, Respondents are not claiming that the Secretary should have reduced another Tribe's payment, whether under the ISDA contracts or otherwise. Rather, Respondents claim only that the government must fulfill its contractual commitments, and when it does not, it must pay damages for breach just like any other contracting party. By its terms, §450j-1(b) protects the secretarial amounts of other Tribes, but it does not authorize the BIA to shortchange contractors who are owed contract support costs.

B. Damages Are Properly Paid From The Judgment Fund.

The Judgment Fund is available to pay contract damages, satisfying the Appropriations Clause and distinguishing *OPM* v. *Richmond*, 496 U.S. 414, 431-32 (1990). Congress enacted the Judgment Fund precisely to cover situations like this, 31 U.S.C. §1304(a), and the Contract Disputes Act, which applies to ISDA contracts, 25 U.S.C. §450m-1(d), expressly refers to the Judgment Fund in addressing payment of dam-

ages awards. 41 U.S.C. §7108(a). Moreover, *Cherokee* recognized that tribal contractors may recover from the Judgment Fund. 543 U.S. at 643-44.

1. The government notes that the Judgment Fund is available only when "payment is not otherwise provided for," 31 U.S.C. §1304(a), and argues that "the annual appropriations" for contract support costs "otherwise provide for" payment. Pet. Br. 53. But the "payment" that must not be "otherwise provided for" is the payment of "final judgments" for money damages. 31 U.S.C. §1304(a). Like any other "'agency operating appropriation[],'" the contract-support-cost appropriations "'are not available to pay judgments against the United States.'" *Samish Indian Nation* v. *United States*, 657 F.3d 1330, 1341 (Fed. Cir. 2011) (quoting 3 GAO Redbook 14-31). Thus, the Judgment Fund is the only proper source of Respondents' recovery. Indeed, under the government's theory, damages recoveries in government contract litigation would never be available from the Judgment Fund because every government contract is paid out of some appropriation.

2. Equally meritless is the government's claim, Pet. Br. 54, that the reimbursement provision of the Contract Disputes Act, 41 U.S.C. §7108(c), bars Respondents' recovery from the Judgment Fund. This provision directs "the agency whose appropriations were used for the contract" that led to a judgment to reimburse the Judgment Fund "out of available amounts or by obtaining additional appropriations for purposes of reimbursement." *Id.*

On its face, the provision is plainly directed to the agency, not the contractors. The government cites no case, and we are aware of none, that holds or even remotely suggests that this reimbursement provision undermines the rights of contractors and implicitly

amends the scope of the Judgment Fund, allowing the government to breach with impunity. Indeed, the provision does not even bind the agencies because it is not legally enforceable. See GAO, GAO-04-481, *Judgment Fund* 11 (2004) (statutes provide "no sanctions that will compel agencies to reimburse the Treasury, and no Treasury authority to take money owed directly from the agency").[21]

Moreover, the provision does not render the statutory caps "pointless." Pet. Br. 54. The government's argument assumes that the point of the caps is to shortchange the Tribes and to allow the agency to breach contracts. Because that assumption is false, the government's argument fails. Whether or not the BIA is required to make reimbursement, the caps continue to have the effect of segregating agency funds that are not legally available for contract support costs from those that are, thereby protecting funding for non-contracting Tribes.[22] *Supra* 41-42. The government elsewhere concedes this is the purpose of the caps. Pet. Br. 19, 28. But, even if the non-binding reimbursement provision were "pointless" (as non-binding provisions often tend to be), that is no basis for disregarding the Judgment Fund, abandoning the venerable *Ferris* doctrine, and allowing

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[21] The BIA has never repaid any of the judgments awarded against it in the long history of this litigation. *See* GAO, GAO-08-295R, *The Judgment Fund: Status of Reimbursements* 9 (2008).

[22] Nor is there any risk that the BIA's reimbursement obligation would threaten ongoing tribal programs because funds needed for ongoing agency programs are not "available" to repay the Fund. Comp. Gen. Op. B-27990.25-O.M. (1987); GAO-04-481, *Judgment Fund* 10-11.

the government to breach contracts without paying damages.

In any event, even if these statutory provisions were ambiguous, the decision below must be affirmed. As discussed, any ambiguity must be resolved in favor of the tribal contractors.

C. Awarding Damages Does Not Undermine Congress's Control Over Appropriations.

Finally, the government asserts that the *Ferris* doctrine "undermine[s] Congress's ability to control expenditures." Pet. Br. 47. The government even suggests that affirming the decision below would turn agencies loose to obligate the government to infinite liability, so long as each individual obligation is a dollar less than the appropriated amount. See *id.* at 21, 47.

This argument is a distraction. First, as the government contends (*id.* at 24), it is generally a federal crime for agencies to obligate the government beyond an appropriation, thus providing a deterrent. See 31 U.S.C. §§1341(a), 1350. But see 25 U.S.C. §450f(a)(1). Second, precisely because of concern for such liability, the government has established stringent requirements for the making and recording of obligations in order to prevent exhaustion of appropriations. See 31 U.S.C. §1501; 2 GAO Redbook 7-6 to -59.

At bottom, the source of the government's problem here is that Congress mandated that the agencies enter into all qualifying self-determination contracts with full payment of contract support costs, but at the same time underfunded the agency. Just as Congress created the problem, it has the power to fix it. See GAO, GAO/RCED-99-150, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need*

to Be Addressed 54-63 (1999) (discussing options available to Congress); Pet. 46a.

For example, Congress could amend the ISDA to remove the agencies' statutory mandate to enter into contracts, or it could give the agencies authority to negotiate lower contract support cost obligations. Cf. *N.Y. Airways*, 177 Ct. Cl. at 808 (Congress could avoid liability by "changing the substantive law ... , rather than by curtailing appropriations"). Alternatively, Congress could pass a moratorium on the formation of new self-determination contracts, as it has done before. See Pub. L. 105-277, §328, 112 Stat. at 2681-291 to -292. Or, Congress could enact true line-item appropriations for particular contractors, giving contractors notice that they would receive only certain amounts. Congress previously contemplated such line-item appropriations but declined to enact them. H.R. Rep. 107-234, at 122 (Conf. Rep.). Congress could also decide to eradicate self-determination contracts and replace them with a system of non-binding grants. Finally, Congress could simply appropriate sufficient funds to cover the contracts, as it recently did for FY 2012. H.R. Rep. 112-151, at 42 (2011).

But, for the periods in question, Congress did not exercise any of these options, and this Court must enforce the choices Congress made. Congress chose to authorize self-determination contracts that create legally binding obligations to pay full contract support costs. Further, it established a mechanism for contractors to bring suit and recover money damages for breach. 25 U.S.C. §450m-1(a). The most that Congress's seemingly schizophrenic statutory scheme creates is ambiguity, and in that circumstance, the decision below must be affirmed.

III. THE GOVERNMENT CANNOT DEFEND ON GROUNDS OF INSUFFICIENT APPROPRIATIONS BECAUSE IT DID NOT SEEK SUFFICIENT APPROPRIATIONS.

Alternatively, the government's claim that the insufficient appropriations excuse its breach also fails for an independent reason: The government did not even try to obtain sufficient appropriations to meet its obligations to all contractors.

Under *S.A. Healy Co.* v. *United States*, the United States cannot defend a breach of contract claim on the basis of an availability clause when the agency did not request sufficient appropriations, unless the contract expressly and clearly shifted to the contractor the risk that the agency may not seek sufficient appropriations to meet its contract obligations. 576 F.2d at 300-05; see *San Carlos Irrigation & Drainage Dist.* v. *United States*, 23 Cl. Ct. 276, 283 (1991) (rejecting appropriations defense because "the BIA did not attempt to obtain appropriations from Congress"). In addition, the United States is bound by the "covenant of good faith and fair dealing" not to "act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp.*, 395 F.3d at 1304-05. These common-sense rules that apply to all government contracts ensure that a contractor whose contract is subject to the availability of appropriations does not shoulder the risk that the contracting agency will fail even to *request* the appropriations needed to fulfill its end of the bargain. When the government receives the benefit of a contract, it should take all reasonable measures to en-

sure full satisfaction of its contractual commitments.[23]

The circumstances necessary to the United States' insufficient-appropriations defense are absent here. First, there is no dispute that, in each relevant year, the Executive Branch's annual budget submitted to Congress did not request sufficient funds to meet the contract support cost need. *E.g.*, J.A. 208-21; Cir. J.A. 231. And, second, nothing in the Model Contract shifts the risk of an insufficient request to the contractor.

In the court of appeals, the government contended that the Secretary satisfied his obligation to seek sufficient funding, not by requesting the necessary appropriations, but by filing contract payment shortfall reports pursuant to 25 U.S.C. §450j-1(c). But the Secretary never submitted timely reports before 1998, and for most years since then, the Secretary submitted *no* reports, and when he did, they were late. *Supra* 10. In any event, even timely reports, which are among thousands of reports Congress receives annually and which do not request funding, would not satisfy the Secretary's burden to request sufficient funding. Having failed to ask for adequate appropriations, the agency's claim of poverty is no defense to breach. *S.A. Healy*, 576 F.2d at 300-05; *Centex Corp.*, 395 F.3d at 1311.

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[23] *See also Collins* v. *United States*, 15 Ct. Cl. 22, 35 (1879) (contract liabilities may be created where there is no appropriation to pay obligations); *Gibney* v. *United States*, 114 Ct. Cl. 38, 50-53 (1949) (same); *AT&T Co.* v. *United States*, 177 F.3d 1368, 1375-76 (Fed. Cir. 1999) (en banc) (invalidation of contract after full performance "is not favored").

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 11-551

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

RAMAH NAVAJO CHAPTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that, each year for more than 15 years, Congress has imposed an express statutory ceiling on the total appropriations available to the Secretary of the Interior to pay contract support costs under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.* Under the ISDA—which unequivocally reserves Congress's authority to control the expenditure of public funds, see 25 U.S.C. 450j-1(b)—the Secretary cannot commit the Treasury to pay more than Congress appropriates. And, as the ISDA requires, the contracts at issue in this class action expressly recognize that the appropriations made available by Congress may be insufficient to cover respondents' requests for funding. Respondents, who entered into contracts containing those terms, have no contractual right to demand payment of amounts Congress did not appropriate.

Respondents nonetheless dismiss the statutory caps as a "distraction" (Br. 52) and insist that they are entitled to recover all of their requested contract support costs as a matter of contract law (Br. 14), overriding Congress's appropriations judgment. That contention is fundamentally misconceived. Absent some competing assertion of constitutional prerogative—and there is none here—this Court has never declined to give effect to an explicit invocation of Congress's authority to determine the amount of funds that may be "drawn from the Treasury" for a particular purpose. U.S. Const. Art. I, § 9, Cl. 7. Respondents remain free to petition Congress to appropriate additional sums. But the United States may not be held liable under the ISDA for the Secretary's compliance with statutory restrictions on the use of public funds.

A. Respondents Received All Of The Funding That The Secretary Promised

Respondents (Br. 14) and their amici contend that this is a "basic contract case" and that each member of the respondent class is entitled to recover, as a remedy for the Secretary's alleged "breach" (Br. 17), all of its requested contract support costs—even if the aggregate sum exceeds the "not to exceed" caps imposed by Congress. *Id.* at 17-35.

That theory fails in several fundamental respects, starting with its premise: neither the ISDA itself nor any contract at issue in this case promises that the Secretary will pay sums in excess of the appropriations provided by Congress. Indeed, although respondents spend pages discussing "basic principles of contract law" (Br. 17), they cannot point to *any example* of a contractual promise by the Secretary in this case that is not expressly made contingent on the availability of appropriations. Their inability to identify such a promise is hardly surprising, given that "[i]t is a fed-

eral crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress." *OPM* v. *Richmond*, 496 U.S. 414, 430 (1990). Because the Secretary did not promise to pay more than Congress appropriated, there is no "breach" that could in turn give rise to a cause of action for damages to be paid out of the Judgment Fund.

1. The Secretary promised to pay only what Congress appropriated

Congress could hardly have been clearer that all funding under the ISDA is subject to Congress's appropriations decisions. Gov't Br. 36-43. The ISDA authorizes self-determination contracts, but it expressly provides that "[t]he amounts of such contracts shall be subject to the availability of appropriations." 25 U.S.C. 450j(c)(1). Every self-determination contract must include an explicit proviso that the Secretary's obligation to "make available" the agreed sums is "[s]ubject to the availability of appropriations." 25 U.S.C. 450*l*(a)(1) and (c) (model agreement § 1(b)(4)). As a corollary, the Act requires every contract to provide that the tribal contractor's own obligation to "administer the programs, services, functions and activities" at issue is likewise "[s]ubject to the availability of appropriated funds." *Id.* (model agreement § 1(c)(3)). The Act itself broadly declares that, "*[n]otwithstanding any other provision in this [Act]*, the provision of funds under this [Act] is subject to the availability of appropriations." 25 U.S.C. 450j-1(b) (emphasis added). And for good measure, Congress has specified in every relevant appropriations act since fiscal year 1999 that the statutory limits on contract support costs shall apply "notwithstanding any other provision of law, including but not limited to the Indian Self-Determination

Act of 1975, as amended." See, *e.g.*, Pub. L. No. 105-277, 112 Stat. 2681-245 to -246.

The ISDA consequently does not guarantee any particular level of funding for contract support costs irrespective of the appropriations Congress actually makes.[1] Indeed, Congress enacted the ISDA's broadest availability-of-appropriations contingency, 25 U.S.C. 450j-1(b), as part of the same 1988 amendments that first created the ISDA's requirement to provide funding for contract support costs. See Gov't Br. 39-40. Congress thus reserved its authority to decide how much public money to make available for contract support costs each year, just as it does for other federally funded programs for the benefit of Indians.

Consistent with the ISDA, *every* contract in the record of this litigation provides that federal funding under the contract is contingent on the availability of appropriations. See, *e.g.*, J.A. 98, 123, 206. Furthermore, as respondents acknowledge (Br. 7), every contract under the ISDA incorporates the provisions of the Act itself—including the broad availability-of-appropriations condition in Section 450j-1(b). See 25 U.S.C. 450*l*(a)(1) and (c) (model agreement § 1(a)(1)). Respondents, both individually and collectively, therefore had notice of the prospect that Congress might decline to fund their contract support costs at 100% of their needs. Each member of the respondent class entered into a contract that explicitly acknowledged the possibility of insufficient appropriations and stipulated that *both* sides would be excused from full performance if appropriations were inadequate. 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) & (5), and (c)(3)).

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[1] Contrary to respondents' assertion (Br. 14, 21-22), the government has consistently argued throughout this litigation that the ISDA does not guarantee "full" funding of tribal contract support costs irrespective of appropriations. See, *e.g.*, Gov't C.A. Br. 17-20; J.A. 82 (answer).

Under "basic principles of contract law" (Br. 17), therefore, respondents have received the benefit of their bargain. As the district court found (and respondents do not dispute), in every fiscal year at issue, the Secretary "distributed to tribal contractors the full amount of funding appropriated for" contract support costs. Pet. App. 98a. Moreover, unlike in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005) (*Cherokee*), in which the governing "appropriations Acts contained no relevant statutory restriction," *id.* at 637, the "not to exceed" caps at issue here bar the Secretary from reprogramming other agency funds. See Resp. Br. 36 n.12 (acknowledging that, unlike here, the government "was free in *Cherokee* to reprogram funds to pay the contract support costs fully"). By distributing to respondents every dollar Congress appropriated for contract support costs each fiscal year, the Secretary fully discharged the government's statutory and contractual obligations.[2]

2. Respondents ignore the plain terms of the contracts and the ISDA

Respondents' argument to the contrary depends on their contention (Br. 25, 43) that the statutory and contractual phrase "subject to the availability of appropriations" does not actually make the Secretary's promise to pay funds from the Treasury contingent upon the availability of appropriations. In respondents' view, the multiple availability-of-appropriations clauses merely operate as

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[2] There is no substance to respondents' contention (Br. 24 & n.8) that the government "conceded" liability in a single sentence in a district-court filing in another litigation. The sentence at issue, which respondents do not reproduce, merely recognized the possibility that the Tenth Circuit might refuse to give effect to the availability-of-appropriations provisos in the ISDA. See Gov't C.A. Br. 49-55.

"*timing* provision[s] that affect[] *when* the contract becomes binding, not how much a party is owed" (Br. 25).

That argument ignores both the statutory text and common sense. Congress meant what it said: the Secretary's obligation to provide funding for contract support costs under the ISDA is "subject to"—that is, "under the contingency of" or "dependent upon," *Webster's New International Dictionary of the English Language* 2509 (2d ed. 1958)—Congress's appropriation of sufficient funds. The very point of such provisions is to reserve Congress's constitutionally rooted authority to control the expenditure of funds from the Treasury. Cf. *OPM* v. *Richmond*, 496 U.S. at 425 (authority of all federal officials is "limited by a valid reservation of congressional control over funds in the Treasury").

Respondents are correct (Br. 25) that one function of a "subject to the availability of appropriations" clause is to enable agencies to enter into contracts for fiscal years for which Congress has not yet made appropriations. See *Cherokee*, 543 U.S. at 643. But the reason it has that effect is that, if Congress fails (or refuses) to appropriate sufficient funds, the contract is not binding on the government: there is no contractual promise to pay more than Congress appropriates, and thus no violation of the Anti-Deficiency Act. See 31 U.S.C. 1341(a)(1)(A)-(B). For the same reason, the plain meaning and effect of Section 450j-1(b) and the corresponding contractual provisions is that the Secretary has no obligation to provide funds beyond what Congress appropriates. See *Bradley* v. *United States*, 98 U.S. 104, 114 (1878) (giving effect to a contractual availability-of-appropriations clause); see also *Sutton* v. *United States*, 256 U.S. 575, 579 (1921) (similar). Indeed, the Secretary could not lawfully do so.

3. Absent a special grant of "contract authority," all federal contracts are subject to the availability of appropriations

Contrary to the arguments of respondents (Br. 22) and their amici, the fact that the Secretary's promise to pay funds from the Treasury is contingent on the availability of appropriations does not make the government's promise "illusory." Because of the Secretary's promises, the Secretary is contractually bound to distribute to respondents all of the appropriated funds Congress makes legally available for the payment of ISDA contract support costs, even if the Secretary would prefer to use that money elsewhere. That was the Court's holding in *Cherokee*, see 543 U.S. at 641-643, and it is uncontested that the Secretary has discharged that responsibility here, see Pet. App. 98a.

Accordingly, the appropriations contingencies do not make the Secretary's promises to pay contract support costs "illusory," any more than the principal commitment made by the government in any ISDA self-determination contract—to provide the amount of public funds that the Secretary "would have otherwise provided for the operation of the programs" at issue, 25 U.S.C. 450j-1(a)(1)—is an "illusory" promise. Indeed, except where Congress provides the "special statutory authority needed to bind the Government without regard to the availability of appropriations," *Cherokee*, 543 U.S. at 643, *all* government contracts are contingent upon the appropriations provided by Congress.

As our opening brief explained (at 31-32), Congress has enacted a handful of statutes that create the special statutory authority—known as "contract authority"—to which this Court referred in *Cherokee*. See 2 U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law* 6-88 (3d ed. 2006) (*Red Book*) (discussing contract authority). Although respondents avoid using the term "contract au-

thority," their arguments boil down to the assertion that the ISDA creates such authority: they argue that the Act requires the Secretary to provide "full" funding for all tribal contract support costs and that, if Congress does not appropriate sufficient funds to cover those costs, tribal contractors can simply recover the unappropriated sums as "damages" from the Judgment Fund. Br. 19-34.

Federal law has long provided, however, that a statute "may be construed * * * to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states * * * that such a contract may be made." 31 U.S.C. 1301(d). This Court relied on that interpretative rule nearly a century ago in *Sutton*, holding that the Secretary of War was "without power" to promise more than the amounts Congress appropriated because Congress had not clearly permitted the making of a deficiency contract. See 256 U.S. at 579 (relying on the predecessor to Section 1301(d)). Some statutes do meet that standard: a provision of the Price-Anderson Act, for example, authorizes the Nuclear Regulatory Commission to "incur obligations without regard to" the Anti-Deficiency Act. 42 U.S.C. 2210(j). In the ISDA, by contrast, Congress not only failed to include any such provision, but repeatedly declared that all funding under the Act is "subject to the availability of appropriations." See 25 U.S.C. 450j(c)(1), 450j-1(b) and 450*l*(c) (model agreement § 1(b)(4)). And as this Court explained in *Cherokee*, one effect of such a provision is precisely to confirm that agency officials do *not* possess the "special statutory authority needed to bind the Government without regard to the availability of appropriations." 543 U.S. at 643.

4. Respondents' "over-commitment" theory underscores the error of their interpretation of the ISDA

Respondents contend that the government is liable for unappropriated funds because the Secretary "over-committed himself" (Br. 1) by accepting too many contractual obligations. But as respondents eventually acknowledge (Br. 52), the ISDA *requires* the Secretary to accept all proposals for self-determination contracts from tribes except in specific circumstances. See 25 U.S.C. 450f(a)(1) ("The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts[.]"); 25 U.S.C. 450f(a)(2)(A)-(E) (permitted grounds for declination). Nor is a tribe limited to a single contract: at any time, a tribe can request an additional contract—for example, to administer a different federal program—or propose to expand an existing contract. The Secretary is generally not free to refuse. If the Secretary does decline a contract request, furthermore, the tribe can sue to reverse that decision. See 25 U.S.C. 450m-1(a) (authorizing "injunctive relief to reverse a declination finding").[3] Even as respondents chastise the Secretary for "over-committing himself" (Br. 1), therefore, they are careful not to suggest that the Secretary had any other choice.

Respondents appear to recognize (Br. 52-53) the difficulty of reconciling: (a) Congress's requirement that the Secretary accept every qualifying ISDA contract, which respondents construe to include a promise of "full" funding for all contract support costs irrespective of appropriations,

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[3] Indeed, the Tenth Circuit has gone so far as to hold that the Indian Health Service was required to accept a tribe's proposal for an ISDA contract notwithstanding that the agency had already promised to other tribes all of the funds in a capped appropriation. *Southern Ute Indian Tribe* v. *Sebelius*, 657 F.3d 1071, 1079-1080 (2011), petition for cert. pending, No. 11-762 (filed Dec. 19, 2011).

with (b) the statutory appropriations caps that Congress has enacted each year for more than 15 years. Respondents' solution to this dilemma is to declare the statutory scheme "schizophrenic" (Br. 53) and insist that they must be paid 100% of their contract support costs notwithstanding the statutory caps. If respondents were correct, the result would be schizophrenic indeed: in their view, Congress effectively required officials at the Bureau of Indian Affairs to violate the Anti-Deficiency Act by promising to pay sums in excess of statutory appropriations limits. That conclusion is itself sufficient reason to reject respondents' interpretation. Cf. *Hercules, Inc.* v. *United States*, 516 U.S. 417, 427-428 (1996) ("We view the Anti-Deficiency Act, and the contracting officer's presumed knowledge of its prohibition, as strong evidence that the officer would not have provided, in fact," the contractual promise claimed).

In any event, the dilemma respondents posit disappears if the plain text of the ISDA is given its intended effect: "Notwithstanding any other provision in this [Act], the provision of funds under this [Act] is subject to the availability of appropriations." 25 U.S.C. 450j-1(b); see also 25 U.S.C. 450j(c)(1), 450*l*(c) (model agreement § 1(b)(4)). In the ISDA, Congress committed the United States to a policy of supporting the self-determination of Indian tribes, and it required the Secretary to accept every qualifying request from an Indian tribe for a contract to administer a federally funded program for the benefit of Indians. But Congress also reserved, in unmistakable terms, its discretion to decide each year how much of the public's money should be spent for that purpose. Accordingly, the Secretary here accepted all of respondents' requests for ISDA contracts and, consistent with those contracts, distributed all of the funds that Congress appropriated for contract support

costs. The Secretary promised—and Congress authorized—nothing more.

5. The Secretary's methodology for distributing the appropriated sums is not at issue

Respondents also criticize the Secretary's methodology for distributing the sums appropriated by Congress for contract support costs. Br. 9-10, 23, 49. But this class action involves no challenge to the Secretary's distribution decisions, nor could it: because the total appropriated sum is fixed, any change in the distribution method would benefit some class members at the expense of others. This case arises solely from respondents' claim that the Secretary's refusal "to pay more than the 'not to exceed' level" of funding specified in the appropriations caps constitutes a breach of contract as to *every* member of the class. J.A. 73 (amended class complaint).

In any event, respondents' objections lack merit. Contrary to respondents' caricatures, the Secretary does not claim unfettered discretion to "pay[] whomever [he] wants and shortchang[e] the rest" (Br. 2). But the Secretary obviously had to adopt *some* methodology for distributing the appropriated funds without exceeding the statutory caps, and the D.C. Circuit ruled more than a decade ago that the Secretary was required to do so in an equitable manner consistent with the ISDA. *Ramah Navajo Sch. Bd., Inc.* v. *Babbitt*, 87 F.3d 1338, 1347-1349 (1996). Accordingly, the Secretary has distributed the funds appropriated by Congress each year in a transparent and proportional manner—originally on a "uniform, pro rata basis" (Pet. App. 9a) as provided in annual notices in the *Federal Register*, and now according to an algorithm developed in 2006 after extensive consultation with affected tribes. See Gov't Br. 11

& n.5. Some of respondents' contracts expressly refer to those policies. See, *e.g.*, J.A. 123.

Nor is there any merit to respondents' suggestion (Br. 9-10) that the Secretary's methodology over-compensates or under-compensates certain tribes. The data on which respondents rely, which appear on the website of one of their amici, are not in the record below. But as far as we can tell, the variations they describe are the results of ordinary, after-the-fact adjustments to indirect cost rates based on audits of the affected tribes' expenses. Cf. Resp. Br. 21 n.5 (noting that such adjustments are "commonplace in government contracts"). And even if the Secretary's methodology were flawed, that would mean, at most, that the capped sums must be distributed differently—not that respondents could recover amounts in excess of the statutory caps.

B. Because Of The Statutory Caps, Respondents' Reliance On *Cherokee* And *Ferris* Is Misplaced

Respondents' argument, at bottom, is that the statutory appropriations caps that Congress has imposed each year are irrelevant. But respondents articulate no plausible theory for ignoring express limits Congress placed on the use of public funds. Nor can their argument derive any support from *Cherokee* or *Ferris* v. *United States*, 27 Ct. Cl. 542 (1892), neither of which involved any contention that Congress had, by statute, explicitly circumscribed the authority of agency officials to bind the United States to pay the amounts at issue.

1. Respondents ignore the plain meaning and effect of the statutory appropriations caps

Respondents dismiss the "not to exceed" statutory caps as a "distraction" (Br. 52) and contend that awarding respondents all of their requested contract support costs—in

aggregate amounts far in excess of those caps—would "not undermine Congress's control over appropriations" (Br. 52). But statutory restrictions on the use of public funds are not so easily set aside. "It is for Congress, proceeding under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation." *Hooe* v. *United States*, 218 U.S. 322, 333 (1910). As this Court has explained, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *OPM* v. *Richmond*, 496 U.S. at 427-428. The appropriations caps in this case reflect Congress's judgment that the important federal policies served by underwriting Indian tribes' contract support costs under the ISDA do not justify jeopardizing the funding available for other programs for Indians and Indian tribes, including essential services for tribes that have elected *not* to enter into ISDA contracts. Gov't Br. 28-29; see, *e.g.*, H.R. Rep. No. 609, 105th Cong., 2d Sess. 125-126 (1998) ("[T]he Committee cannot afford to pay 100% of contract support costs at the expense of basic program funding for tribes."). Judgments of that kind are quintessentially for Congress to make. Respondents do not cite, and we have not found, any case in which this Court has declined to give effect to such an explicit invocation of Congress's appropriations authority, at least absent some competing claim of constitutional prerogative, which respondents do not advance here.

In respondents' view, however, the "not to exceed" statutory caps impose no upper limit at all on the amounts to be paid from the Treasury. Respondents construe the caps as merely procedural in effect: the only consequence of the

Secretary's exhaustion of the appropriated sum, they argue (Br. 38, 51), is that tribal contractors may recover the remainder of their contract support costs from the Judgment Fund, rather than from the Secretary directly. Respondents insist (Br. 28-34) that, by appropriating enough funds to satisfy the claim of any single contractor taken alone, Congress permitted the Secretary to bind the United States to *any number* of contracts as long as no single contract exceeds the appropriated amount, irrespective of the aggregate sum.

This Court has never embraced such an extraordinary proposition, which would substitute the individual decisions of administrative officials for Congress's own determination of the total sums that may be paid from the Treasury. *OPM* v. *Richmond*, 496 U.S. at 427-428; see *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937) (Appropriations Clause "was intended as a restriction upon the disbursing authority of the Executive department"); *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("Any other course would give to the fiscal officers a most dangerous discretion."). Respondents' approach would also undermine another basic purpose of the Appropriations Clause, which is to ensure political accountability for the use of the public's money. See Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988). Congress decided how much money the Treasury would pay for ISDA contract support costs, and neither the Secretary nor respondents were free to ignore its judgment.

2. *This Court has consistently held that agency officials cannot obligate public funds in excess of the appropriations provided by Congress*

In light of Congress's plenary authority over the use of public funds, this Court has consistently held that the

United States is not bound by an *ultra vires* promise by an executive official to pay sums that Congress has not appropriated. See, *e.g.*, *Leiter* v. *United States*, 271 U.S. 204, 206-207 (1926); *Sutton*, 256 U.S. at 579; *Hooe*, 218 U.S. at 333; *Bradley*, 98 U.S. at 113-114, 117; *Reeside*, 52 U.S. (11 How.) at 291. See generally Gov't Br. 32-35. As this Court explained in *Bradley*, absent a statutory grant of contract authority, "it is clear that the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation." 98 U.S. at 114.

Respondents would distinguish (Br. 44-46) these precedents on various factual grounds, including that the appropriations acts at issue in the *Sutton*, *Bradley*, and *Hooe* cases involved smaller sums for particular government projects. In none of those decisions, however, did this Court's reasoning depend on the size of the appropriation, the number of contractors actually or potentially involved, or any of the other grounds on which respondents now seek to distinguish them. The Court simply reasoned that, as a consequence of Congress's plenary authority over the use of public money, the responsible executive officials lacked the authority to bind the United States to pay sums that Congress had not authorized to be paid. In *Sutton*, for example, the Court did not weigh whether it was "reasonable to require the contractor to bear the risk" (Br. 44) of insufficient funds in light of the size of the appropriation or other factors. Instead, relying on the predecessor to 31 U.S.C. 1301(d), the Court rejected the contractor's claim on the straightforward ground that Congress had not unambiguously authorized the making of a deficiency contract. "The Secretary of War was, therefore, without power to make a contract binding the Government to pay more than the amount appropriated." 256 U.S. at 579.

Respondents offer no principled reason—let alone any textual basis in the Appropriations Clause—to conclude that the force of Congress's exercise of its constitutional authority to control the use of the public's money depends on whether a particular appropriation is a "line-item" or, as here, a larger but nonetheless expressly limited sum. Respondents (Br. 48) and their amici argue that contractors proceeding under a larger appropriation may lack notice if a contracting officer has reached the limit of available appropriations. But even if some form of constructive notice to contractors were required, explicit "not to exceed" appropriations caps of the kind at issue in this case provide a clear and public warning that Congress has restricted the discretion of executive officials to bind the government by contract. Respondents, notably, do not deny (Br. 47-48) that they have had *actual knowledge* of the statutory restrictions on the Secretary's authority to pay contract support costs. See Gov't Br. 50-51.

In any event, this Court has never suggested that a contractor may be entitled to recover money from the Treasury that Congress has refused to appropriate merely because the contractor lacked notice of the restriction. To the contrary, the Court has consistently held that such equitable considerations cannot permit a litigant to circumvent statutory restrictions on access to funds in the Treasury. In *OPM* v. *Richmond*, for example, the Court held that unauthorized advice by Executive Branch officials could not estop the government from enforcing limitations on the payment of public money, even though it produced individual hardship. 496 U.S. at 424-434. Likewise, in *Sutton*, the Court rejected the proposition that agency officials could, through their conduct, create an implied contract for the payment of sums Congress had not appropriated. 256 U.S. at 580-581. Respondents' theory here—that agency offi-

cials can bind the United States to pay sums far in excess of an expressly capped appropriation, merely because Congress appropriated a sum large enough to pay the costs of any one contractor considered in isolation—is even more plainly at odds with Congress's constitutional authority to regulate the terms on which public funds may be drawn from the Treasury.

3. Cherokee *and* Ferris *do not authorize courts to disregard statutory restrictions on public funds*

Because of the statutory appropriations caps, respondents and their amici are mistaken in their belief that *Cherokee* and *Ferris* support their position. See Gov't Br. 48-52. This Court in *Cherokee* did not discuss any of the precedents above, let alone overrule more than a century of decisions holding that, absent a statutory grant of "contract authority," executive officers cannot bind the United States to pay amounts in excess of appropriations. And *Ferris*, which predated nearly all of those precedents, is not inconsistent with them.

Cherokee involved the government's liability for ISDA contract support costs that were promised in contracts funded by an ordinary, unrestricted, lump-sum appropriation. In holding that the government was liable for contract support costs that the agency did "not deny that it promised to pay," this Court repeatedly stressed that Congress had "appropriated sufficient *legally unrestricted* funds to pay the contracts at issue." 543 U.S. at 637 (emphasis added). Indeed, in rejecting the arguments advanced by the government, the Court referred *eight times* to the fact that Congress had imposed no statutory restriction on the agency's ability to reprogram other appropriated funds in

order to satisfy the tribes' claims.[4] Although respondents now suggest (Br. 35-36) that *Cherokee* too involved the application of a statutory cap, that contention is flatly at odds with the Court's opinion. See, *e.g.*, 543 U.S. at 637 (stressing that "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue").

Ferris is even farther afield. Like *Cherokee*, *Ferris* involved a claim that the government was liable for breach of contract because agency officials had diverted, for other purposes, appropriated sums that the agency had lawfully obligated for the contractor. See 27 Ct. Cl. at 542-547. Cf. *Cherokee*, 543 U.S. at 641-642 (rejecting the contention that appropriations were unavailable merely because agency officials preferred to "allocate[] the funds to another purpose"). The court in *Ferris* had no need to consider whether the appropriation at issue included a statutory ceiling, as respondents now argue (Br. 35), because the breach was entirely attributable to the discretionary choices of agency officers who redirected funds that, at the

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[4] See *Cherokee*, 543 U.S. at 637 ("These appropriation Acts contained no relevant statutory restriction."); *ibid.* (discussing the applicable rule when "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue"); *id.* at 640 (discussing who "should bear the risk that an unrestricted lump-sum appropriation would prove insufficient" to pay all claimants); *id.* at 641 (noting that "the relevant congressional appropriations contained *other* unrestricted funds, small in amount but sufficient to pay the claims at issue"); *ibid.* (rejecting the argument that certain "funds, though legally unrestricted (as far as the appropriations statutes' language is concerned), were nonetheless unavailable" to the tribes); *id.* at 642 (recognizing that Congress may "protect funds needed for more essential purposes with *statutory* earmarks"); *id.* at 643 (concluding that the ISDA's availability of funds provision was irrelevant because "Congress appropriated adequate unrestricted funds here"); *id.* at 647 (emphasizing that Congress "unambiguously provided unrestricted lump-sum appropriations").

time the contract was signed, were sufficient to cover the contract and had not been obligated for any other purpose. See *Cherokee*, 543 U.S. at 641 (citing *Ferris* for this proposition). The Court of Claims therefore did not confront any contention that, because of a statutory restriction, the agency lacked the authority to bind the United States to pay the amounts at issue in the first place.

As discussed in our opening brief (at 50), moreover, *Ferris* did not involve a contract expressly made contingent on the availability of appropriations. And to the extent *Ferris* turned on whether the contractor had actual knowledge of the insufficiency of appropriations, see 27 Ct. Cl. at 547, there is no question that respondents had such knowledge here. See p. 16, *supra*; Gov't Br. 50-51.

Respondents (Br. 14-15) and their amici thus significantly overread *Ferris* in declaring that it has been the law for 120 years that "an agency is bound to its contractual promises regardless of whether Congress appropriated enough money to cover all of the agency's contracts." If that sweeping proposition were the law, this Court's subsequent decisions in *Sutton*, *Bradley*, and other cases would have come out the other way, and this Court in *Cherokee* would have had no reason to emphasize that the appropriations at issue "contained no relevant statutory restriction." 543 U.S. at 637. Indeed, respondents are forced to acknowledge an "exception" to the supposed "firm rule" of *Ferris* (Br. 33-34) for every case in which this Court has addressed the same subject in the last century. This Court has never endorsed respondents' view that even an explicit statutory appropriations cap is ineffective to limit the ability of agency officials to bind the Treasury, and all of the Court's decisions point to the opposite conclusion.

In predicating their argument on *Ferris*, moreover, respondents ignore central features of the ISDA statutory

scheme. Under that scheme, respondents occupy a position wholly unlike the private contractor in *Ferris*, whose contract proposal the government was not required to accept and who had no relationship, legally or practically, to any other contractor who might seek payment from the same appropriation. By contrast, as evidenced by their joining together in this nationwide class action, respondents participate in a detailed statutory scheme in which, for present purposes, they are equally situated, and in which they equally participate in seeking an allocation of federal funds. The Secretary generally is required to accept each tribe's contract proposals, without regard to how many other contracts the Secretary has accepted, see p. 9, *supra*; Congress makes a single annual appropriations decision governing all of respondents' contracts at once, in contemplation of all tribes' right to participate in the statutory scheme simultaneously; and Congress specifically instructed the Secretary to consider the welfare of all other tribes in making funding decisions for each tribe, see 25 U.S.C. 450j-1(b). Under these circumstances, respondents cannot circumvent the explicit statutory caps imposed by Congress on the total funds available to pay contract support costs for all ISDA contractors by focusing on the dealings of each individual contractor with the Secretary in isolation, without regard to the equivalent rights and needs of other tribal contractors under the same statutory scheme.

C. Respondents Cannot Predicate Contract Liability On The President's Budget Proposals To Congress

Finally, respondents briefly attempt (Br. 54-55) to defend the judgment below on the ground that, over the years, Presidents have not submitted legislative proposals to Congress requesting sufficient appropriations to cover 100% of ISDA contract support costs. That contention,

which was not addressed by the majority below or by the district court, is without merit. See Pet. App. 84a-86a (Hartz, J., dissenting) (rejecting this contention); see also *Arctic Slope Native Ass'n* v. *Sebelius*, 629 F.3d 1296, 1305-1306 (Fed. Cir. 2010) (rejecting the same argument), petition for cert. pending, No. 11-83 (filed July 18, 2011).

This Court has never suggested that the President's failure to make a particular legislative proposal to Congress may provide a basis for imposing civil liability on the government. That proposition would, at a minimum, raise serious constitutional questions under the Recommendations Clause, which protects the President's authority to recommend to Congress "such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3. Nor is Congress's authority under the Appropriations Clause contingent upon any request for funding from the Executive Branch. Moreover, respondents' notion (Br. 54) that the government cannot assert an appropriations defense to a lawsuit if the President failed to make a particular budget request is, in substance, merely an estoppel claim, albeit one even more fundamentally flawed than the claim this Court rejected in *OPM* v. *Richmond*. See 496 U.S. at 434 ("In this context there can be no estoppel, for courts cannot estop the Constitution.").

In any event, nothing in the ISDA or any contract at issue in this case purports to impose on the President an obligation to request any particular level of appropriations. As the dissent below recognized, the Court of Claims case on which respondents rely, *S.A. Healy Co.* v. *United States*, 216 Ct. Cl. 172 (1978), was "fact-specific" and the "rule stated in the opinion would not apply here." Pet. App. 84a. The statutory appropriations caps are themselves proof that Congress has been aware for years of respondents'

mounting claims for contract support costs and has declined to fund them in full.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-551

IN THE

Supreme Court of the United States

KENNETH L. SALAZAR,
SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

RAMAH NAVAJO CHAPTER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF FOR THE ARCTIC SLOPE NATIVE ASSOCIATION, LTD. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a government contractor which has fully performed its end of the bargain has no remedy in money damages for non-payment when a government agency over-commits itself to other projects and, as a result, elects not to fully pay the contractor.

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AMICUS CURIAE BRIEF FOR THE ARCTIC SLOPE NATIVE ASSOCIATION, LTD.

Amicus curiae Arctic Slope Native Association submits this brief to address how the government's extreme reformulation of government contract law contains no limiting principle and will render utterly illusory the core concept of a binding contract with the government.

INTEREST OF *AMICUS CURIAE*[1]

Amicus Arctic Slope Native Association (Arctic) is a tribal contractor doing business with the U.S. Indian Health Service (IHS) under the Indian Self-Determination Act, 25 U.S.C. §§ 450 to 458bbb-2 (ISDA), and has a Petition pending before this Court in a closely related case. See *Arctic Slope Native Ass'n, Ltd.* v. *Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *petition for cert. pending*, 80 U.S.L.W. 3126 (U.S. July 18, 2011) (No. 11-83) ("*Arctic*").

In September 1998, Arctic and IHS entered into a compact and accompanying annual funding agreement for Arctic to operate the IHS Samuel Simmonds Hospital in Barrow, Alaska, commencing October 1, 1998 (fiscal year 1999). *Arctic*, Cir. J.A. 118-76 (compact), 155-86 (funding agreement).

The master compact provided that the contract price each year included the Secretarial amount specified in § 450j-1(a)(1), and the contract support

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[1] Undersigned counsel have long represented *amicus* and also represent respondents. Neither counsel nor respondents have made a monetary contribution toward the preparation or submission of this *amicus* brief. Petitioners and Respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

costs specified in § 450j-1(a)(2). *Arctic*, Cir. J.A. 142.[2] Likewise, the associated annual funding agreement provided that "[Arctic] shall receive contract support as defined in [§ 450j-1(a)(2) and (3)]" (*id.* at 162), and specified these "[c]ontract support funds" in a preliminary funding table. *Id.* at 161.

Since the compact and annual funding agreement were executed before the start of the fiscal year, the compact recited that payments were "[s]ubject only to the appropriation of funds by the Congress." *Id.* at 133. These provisions echoed the ISDA's statement that "the provision of funds ... is subject to the availability of appropriations," 25 U.S.C. § 450j-1(b); see also *id.* § 450*l*(c)(3) (mandatory contract sec. 1(b)(4)) (repeating "subject to the availability of appropriations" clause), a common feature of government contract law. *Infra* at 1a-12a (collecting 48 statutes).

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[2] Referencing § 303(a)(6) of ISDA Title III, added by Indian Self Determination Act Amendments of 1988, Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2297 (requiring payment of "an amount equal to that which the tribe would have been eligible to receive under contracts and grants under [Title I of the ISDA]"), *repealed and replaced with* Title V, 25 U.S.C. §§ 458aaa to 458aaa-13, *see* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 10, 114 Stat. 711, 734. The United States and the petitioners in the *Arctic* case agree that there is no difference between a contractor's payment rights under Title I, Title III or Title V of the ISDA. *Arctic*, Br. for Resp. 6 n.2. Under Title I, a contractor is entitled to be paid the secretarial amount under § 450j-1(a)(1), plus the contract support cost amount under § 450j-1(a)(2); to insist that "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled" under those sections, § 450j-1(g); and to have a funding agreement in which the funding amount "shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]." 25 U.S.C. § 450*l*(c), Model Contract sec. 1(b)(4).

IHS promised to pay Arctic its full contract support costs in upcoming fiscal year 1999. When Arctic and IHS executed the contract documents in September 1998, IHS had in place an agency "Circular" addressing various contract support cost issues. *Arctic*, Cir. J.A. 270-91. The Circular was cited in the contract. *Id.* at 162. Under the Circular, IHS maintained a "priority list" which ranked the order in which IHS was going to pay particular contractors their contract support cost requirements. *Id.* at 279-80 (§ 4.A(4)(a)(ii)-(iii)). Contractors at the top of the Priority List were paid first and in full until agency funds ran out. As of September 1998, when the contract documents were signed, Arctic was at the top of the agency's Priority List (*id.* at 740), meaning that under the fiscal year 1999 contract IHS would pay 100 percent of Arctic's contract support cost requirements. *Id.* The Priority List (or "queue") was also cited in the contract. *Id.* at 161 n.5 ("[Arctic] is pending in the queue [or Priority List] for ISDA [contract support] funds of $2,130,451.").

Because the contract was subject to the availability of appropriations yet to be enacted, the contract also recited that "all amounts to be paid in [fiscal year] [19]99 are estimates and are subject to amendment to reflect the full amount due for [fiscal year] [19]99." *Id.* at 162.[3] All of these provisions were consistent

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[3] Elsewhere in the annual funding agreement, the agency indicated that it need not pay contract support costs while funding remained uncertain, *Arctic*, Cir. J.A. 161, but such language does not alter the government's contractual obligation, both because annual funding agreements cannot supplant the Model Contract and the ISDA's requirement of full contract support funding, and also because payment of damages for breach can be paid from the Judgment Fund. *See* Resp. Br. 27-28, 49-50. In any event, even if the contractual language were

with the compact's overarching directive that the funding agreement would eventually specify no less than the full amount of contract support costs determined under Title I, *supra* at 1-2 & n.2,[4] with payment subject to the availability of appropriations.

Arctic would have been paid in full in fiscal year 1999, but for a sudden shift in agency policy announced after the year ended. For fiscal year 1999 Congress enacted a $35,000,000 increase in the capped IHS earmark used to pay contract support costs.[5] Because Arctic was at the top of the Priority List, it should have received full payment of its contract support costs. But payments from IHS lagged, and after the contract year was over and performance complete, the agency announced its "departure" from "present policy." *Arctic*, Cir. J.A. 240 (IHS Director's letter). IHS declared that it was eliminating its priority list altogether and moving to an entirely different payment system.

As a result of the agency policy shift, Arctic was never fully paid as originally promised. Instead, all told, Arctic received a mere 42.15% of its full contract

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ambiguous, the contracting Tribes prevail. 25 U.S.C. § 450*l*(c), sec. 1(a)(2).

[4] The amounts stated in the contract were also "subject to additions for Medicare, Medicaid, and other reimbursements ... including amounts that have historically been distributed as non-recurring funds under Title I." *Arctic*, Cir. J.A. 162 (AFA § 4(b)). IHS classifies indirect contract support costs as "non-recurring" funds. *Id.* at 271.

[5] *See* Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to 2681-279 (1998) ("not to exceed $203,781,000"); *compare* Pub. L. No. 105-83, 111 Stat. 1543, 1582-83 (1997) ($168,702,000).

support cost requirement that year, leaving a $1,912,941 shortfall.[6]

Payments in fiscal year 1999 ranged widely across all IHS contractors. The IHS Director explained that, under the new payment system, IHS wanted to prioritize contract payments to "contractors that have the greatest overall [contract support cost] need." *Arctic*, Cir. J.A. 240. But, instead of accomplishing that goal, FY 1999 contract payments varied enormously across the 327 contractors, with 44 contractors fully paid, 260 contractors underpaid (some receiving as little as 40.89% of their contract price), and 23 contractors actually *overpaid* (some by over 139%). *2000 CSC Report* 15-17.

In September 1999, Arctic and IHS executed a new annual funding agreement in advance of the coming fiscal year 2000. The agreement, along with the standing compact, again assured full funding of contract support costs subject only to the availability of appropriations. In addition to repeating most of the preceding year's terms, the new agreement reiterated that "[c]ontract support cost funding is calculated and paid under this AFA in accordance with [§ 450j-1] of the [ISDA]," and it reassured Arctic that "[n]othing in this provision shall be interpreted to waive [Arctic's] right to be paid the contract support costs to which it is entitled in accordance with [§ 450j-1(a)(2)] of the [ISDA]. *Arctic*, Cir. J.A. 199.

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[6] IHS calculated that Arctic's full CSC requirement was $3,306,506, but that Arctic had received only $1,393,565. *See Fiscal Year 2000 CSC Shortfall Report* 4 (cols. Q, R) (2000), *available at* http://www.ncai.org/fileadmin/contract_support/2012/IHS_FY_2000_CSC_Shortfall_Report_-_FINAL_1999_data.pdf ("*2000 CSC Report*").

Arctic might have been paid in full in fiscal year 2000, but for yet another agency shift in policy. Although Congress increased total contract support cost appropriations by $25,000,000, see Pub. L. No. 106-113, 113 Stat. 1501, 1501A-181 (1999), mid-year IHS issued a new Circular addressing contract support costs. This Circular provided that, unlike previous years, increased appropriations would now be paid in proportion to each contractor's calculated shortfall, and (unlike fiscal year 1999) would not be prioritized to the most severely underfunded contractors. *Arctic*, Cir. J.A. 292, 322-24. Final agency calculations and payments under the new system took the whole year.

As a result, once again, Arctic was not fully paid its contract support costs incurred in operating the Barrow Hospital. All told, Arctic was eventually paid only 86.66% of its full contract requirement for fiscal year 2000, leaving a shortfall of $489,182.[7]

As for other contractors, payments once again varied widely. Two contractors were paid less than 35% of their contract price, scores of others were paid amounts ranging from 35% to over 90% of the contract price, 38 contractors were fully paid, and 41 contractors were overpaid by as much as 198.32%. *2001 CSC Report* 15-19.[8]

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[7] IHS calculated that Arctic's contract support cost requirement was $3,677,284, but that Arctic had received only $3,178,102. *See Fiscal Year 2001 CSC Funding Report* 4 (cols. Q, R) (2001), *available at* http://www.ncai.org/fileadmin/contract_support/2012/IHS_FY_2001_CSC_Shortfall_Report_-_FINAL_2000_data.pdf ("*2001 CSC Report*").

[8] Similar funding disparities continue to this day. *See Fiscal Year 2010 Report to Congress on Funding Needs for Contract Support Costs of Self-Determination Awards* (amended Feb. 2012) (FY 2009 data), *available at* http://www.ncai.org/

Despite many contractors being left unpaid, IHS carried unspent contract support cost funds on its books for both years, and eventually $179,539 (FY 1999) and $137,013.51 (FY 2000) lapsed back to the Treasury. *Arctic*, Pet. App. 17a n.11.

ARGUMENT

The government argues that when a bulk multi-hundred million dollar agency appropriation from which over 330 contractors will be paid is insufficient to pay them all, then a contractor only has a legal right to receive whatever amount the agency decides in its discretion to pay him.

This position comes with no limitations. It does not matter—as occurred here—if the agency never tells the contractor in advance that the contract price is going to be reduced. It does not matter—as occurred here—if the agency never tells the contractor of the price change until after performance is complete and the government has received the full benefit of that performance. It does not matter—as occurred here—if the price change is the result of an agency reversal of prior policy about how contracts will be paid. And, at the end of the day, it does not matter if the agency is just $1 short on what it needs to pay all contractors in full, and then decides to pay the contractors pro rata, first-come first-served, by some other criteria, or by no apparent criteria at all.

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fileadmin/contract_support/IHS_FY_2010_CSC_Shortfall_Report__2009_narrative_and_tables_.pdf, showing 19 overpaid contractors (one as high as 352.00%, at 17, col. X), and scores of underpayments running as low as 7.68% (at 17, col. X). Tellingly, and despite the ISDA's command, *see* 25 U.S.C. § 450j-1(c), this report was transmitted to Congress three years late and was thus useless in helping Congress avoid or correct funding deficiencies.

That formulation cannot survive over a century of settled contract law, which provides the backdrop against which Congress authorized these government contracts.

Under that settled law, a normal "availability" clause permits a contract like Arctic's to be awarded before performance begins and before Congress enacts a liquidating appropriation from which the contract will be paid. *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 643 (2005). If the subsequent appropriation is, on its face, sufficient to pay that contract price, the right to be paid that price is secure, *id.* at 637-38, 640, 641, 643 (all citing *Ferris* v. *United States*, 27 Ct. Cl. 542, 546 (1892)), and failure to pay it is a contract breach for which damages will lie. *Id.* at 642-43. On the other hand, if the appropriation on its face is insufficient to pay the contract (which was never the case here), then that fact is also readily apparent from the face of the appropriations Act and the contractor is bound by it. *Sutton* v. *United States*, 256 U.S. 575, 578-79 (1921).

This is the law that Congress embraced when it referred to ISDA agreements "426 times" as true "'contract[s]'"—"'a promise ... for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty'"—and when Congress then made those agreements binding under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. *Cherokee*, 543 U.S. at 639 (citation omitted).

No principle of government contract law even hints at the extreme formulation now advanced by the government: namely, that a routine and normal availability clause is not just directed at future congressional action, but also vests in the agency unreviewable and carte blanche discretion to pay or not to pay contracts at will; to change rules even after

the government has secured the full benefit of the contractor's performance (here, operation of the government's Barrow hospital for two full years); to promise one thing when the contract is signed, then do something entirely different when it suits the agency; and to do all of this without any accountability under the Contract Disputes Act. Such a notion not only defies over a century of government contract law; it also defies a quarter century of repeated congressional efforts to *eliminate* agency discretion as much as possible in the funding and payment of ISDA contracts. See Indian Self Determination Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285, 2292-94; Indian Self Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250; Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711. See Resp. Br. 39 & n.13; NCAI *Amicus* Br. § II.

What this Court said 125 years ago is just as true today: "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray* v. *Charleston*, 96 U.S. 432, 445 (1877). To accept the government's formulation would not just inject "legal uncertainty" into the government contracting world, *Cherokee*, 543 U.S. at 644 (citing *Franconia Assocs.* v. *United States*, 536 U.S. 129, 142 (2002); *United States* v. *Winstar Corp.*, 518 U.S. 839, 884-85 & n.29 (1996) (plurality opinion); *id.* at 913 (Breyer, J., concurring); *Lynch* v. *United States*, 292 U.S. 571, 580 (1934)); it would eviscerate the whole concept of a mutually-binding contract and it would be "'madness'" for contractors ever to deal with the government. *Winstar*, 518 U.S. at 864 (plurality opinion) (quoting *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 78 (1866)). Fortunately,

that is not the law, as this Court made plain in *Cherokee*.

CONCLUSION

For the foregoing reasons, the Court should affirm the Tenth Circuit's decision in *Ramah*, grant the Petition in *Arctic*, vacate the Federal Circuit's decision, and remand *Arctic* for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX

COMPARABLE STATUTES

1. 7 U.S.C. § 8503(a) ("Subject to the availability of appropriations to carry out this section, the Secretaries shall provide funds to support brown tree snake control, interdiction, research, and eradication efforts carried out by the Department of the Interior and the Department of Agriculture, other Federal agencies, States, territorial governments, local governments, and private sector entities. Funds may be provided through grants, contracts, reimbursable agreements, or other legal mechanisms available to the Secretaries for the transfer of Federal funds.").

2. 8 U.S.C. § 1324b(l)(2)(A) ("In order to carry out the campaign under this subsection, the Special Counsel . . . may, to the extent deemed appropriate and subject to the availability of appropriations, contract with public and private organizations for outreach activities under the campaign . . . .").

3. 10 U.S.C. § 1076a(i) ("The authority of the Secretary of Defense to enter into a contract under this section for any fiscal year is subject to the availability of appropriations for that purpose.").

4. 10 U.S.C. § 1092(b) ("Subject to the availability of appropriations for that purpose, the Secretary of Defense may enter into contracts with public or private agencies, institutions, and organizations to conduct studies and demonstration projects under subsection (a).").

5. 10 U.S.C. § 2324(e)(3)(A) ("Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, the head of an agency awarding a covered contract (other than a contract to which paragraph (2) applies) may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract . . . .").

6. 10 U.S.C. § 2360(a) ("Subject to the availability of appropriations for such purpose, the Secretary of Defense may procure by contract under the authority of this section the temporary or intermittent services of students at institutions of higher learning for the purpose of providing technical support at defense research and development laboratories.").

7. 10 U.S.C. § 2780(a)(2) ("The authority of the Secretary to enter into a contract under this section for any fiscal year is subject to the availability of appropriations.").

8. 16 U.S.C. § 1863(a)(3) ("Subject to the availability of appropriations, the Secretary shall award contracts, grants and other financial assistance to United States citizens to carry out the purposes of subsection (1) . . . .").

9. 22 U.S.C. § 277d-44(c)(1) ("Notwithstanding any provision of Federal procurement law, the Commission may enter into a multiyear fee-for-services contract with the owner of a Mexican facility in order to carry out the secondary treatment requirements of sub-section (a) of this section and make payments under such contract, subject to the availability of appropriations and subject to the terms of paragraph (2).").

10. 22 U.S.C. § 1465d(b) ("The Board may carry out the purposes of section 1465a of this title by means of grants, leases, or contracts (subject to the availability of appropriations), or such other means as the Board determines will be most effective.").

11. 22 U.S.C. § 1465cc(c) ("The Board may carry out the purposes of this subchapter by means of grants, leases, or contracts (subject to the availability of appropriations), or such other means as the Board determines will be most effective.").

12. 22 U.S.C. § 2716(a)(1) ("Subject to the availability of appropriations, the Secretary of State shall enter into contracts for collection services to recover indebtedness owed by a person, other than a foreign country, to the United States which arises out of activities of the Department of State and is delinquent by more than 90 days.").

13. 22 U.S.C. § 4024(a)(4)(B) ("In the exercise of functions under this subchapter, the Secretary of State may . . . if and to the extent determined to be necessary by the Secretary of State, obtain without regard to the provisions of law governing appointments in the competitive service, by appointment or contract (subject to the availability of appropriations), the services of individuals to serve as language instructors, linguists, and other academic and training specialists (including, in the absence of suitably qualified United States citizens, qualified individuals who are not citizens of the United States) . . . .").

14. 22 U.S.C. § 4026(a) ("In order to facilitate their transition from the Service, the Secretary may provide (by contract or otherwise, subject to the availability of appropriations) professsional career counseling, advice, and placement assistance to members of the Service, and to former members of the Service who were assigned to receive counseling and assistance under this subsection before they were separated from the Service, other than those separated for cause.").

15. 22 U.S.C. § 6435a(c)(1) ("Subject to the availability of appropriations, the Commission may contract with and compensate Government agencies or persons for the conduct of activities necessary to the discharge of its functions under this subchapter."

16. 22 U.S.C. § 6435a(c)(2) ("In the case of a study requested under section 6474 of this title, the Commission may, subject to the availability of appropriations, contract with experts and shall provide the funds for such a study.").

17. 25 U.S.C. 450j(c)(1) ("A self-determination contract shall be—(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and (B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract. The amounts of such contracts shall be subject to the availability of appropriations.").

18. 25 U.S.C. § 450j-1(b) ("Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.").

19. 25 U.S.C. § 450*l*(c) ("The model agreement referred to in subsection (a)(1) of this section reads as follows . . . 'Funding amount—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2).'").

20. 25 U.S.C. § 458aaa-18(b) ("Notwithstanding any other provision of this subchapter, the provision of funds under this subchapter shall be subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe in order to make funds available to another tribe or tribal organization under this subchapter.").

21. 33 U.S.C. § 891d(a)(3)(A) ("The Secretary may not enter into a contract pursuant to this subsection unless the contract includes a provision under which the obligation of the United States to make payments under the contract for any fiscal year is subject to the availability of appropriations provided in advance for those payments . . . .").

22. 38 U.S.C. § 2021(a) ("Subject to the availability of appropriations provided for such purpose, the Secretary of Labor shall conduct, directly or

through grant or contract, such programs as the Secretary determines appropriate to provide job training, counseling, and placement services (including job readiness and literacy and skills training) to expedite the reintegration of homeless veterans into the labor force.").

23. 38 U.S.C. § 8111A(b)(1) ("[T]he Secretary, to the extent authorized by the President and subject to the availability of appropriations or reimbursements under subsection (c) of this section, may enter into contracts with private facilities for the provision during such period by such facilities of hospital care and medical services described in paragraph (2) of this subsection.").

24. 41 U.S.C. § 256(e)(2)(A) ("Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of the provisions of paragraphs (1)(M) and (1)(N) to that contract . . . .").

25. 41 U.S.C. § 4304(b)(1) ("Pursuant to the Federal Acquisition Regulation and subject to the availability of appropriations, an executive agency, in awarding a covered contract, may waive the application of paragraphs (13) and (14) of subsection (a) to that contract . . . .").

26. 42 U.S.C. § 293k-2(e) ("The period during which payments are made to an entity from an award of a grant or contract under subsection (a) shall be 5 years. The provision of such payments shall be subject to annual approval by the Secretary and subject to the availability of appropriations for the fiscal year involved to make the payments.").

27. 42 U.S.C. § 295o-1(e)(1) ("Subject to paragraph (2), in the case of an award to an entity of a grant, cooperative agreement, or contract under this subchapter, the period during which payments are made to the entity under the award may not exceed 5 years. The provision of payments under the award shall be subject to annual approval by the Secretary of the payments and subject to the availability of appropriations for the fiscal year involved to make the payments.").

28. 42 U.S.C. § 296e(d)(1) ("Subject to paragraph (2), in the case of an award to an entity of a grant, cooperative agreement, or contract under this subchapter, the period during which payments are made to the entity under the award may not exceed 5 years. The provision of payments under the award shall be subject to annual approval by the Secretary of the payments and subject to the availability of appropriations for the fiscal year involved to make the payments.").

29. 42 U.S.C § 1437f(c)(2)(B) ("The contract shall further provide for the Secretary to make . . . additional adjustments in the maximum monthly rent for units under contract (subject to the availability of appropriations for contract amendments) to the extent the Secretary determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units that have resulted from the expiration of a real property tax exemption.").

30. 42 U.S.C § 1437f(c)(8)(A) ("Any contract covered by this paragraph that is renewed may be renewed for a period of up to 1 year or any

number or years, with payments subject to the availability of appropriations for any year.").

31. 42 U.S.C. § 6249(b)(4) ("A contract entered in-to under subsection (a) of this section shall include a provision that the obligation of the United States to make payments under the contract in any fiscal year is subject to the availability of appropriations.").

32. 42 U.S.C. § 12206(d)(1) ("Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations.").

33. 42 U.S.C. § 12655n(c) ("Contract authority under this division shall be subject to the availability of appropriations.").

34. 46 U.S.C. § 51317(b)(3) ("Each contract under the program . . . shall be subject to the availability of appropriations.").

35. 50 U.S.C. § 1521(n)(3)(B) (An incentives clause under this subsection shall specify that the obligation of the Government to make payment under such incentives clause is subject to the availability of appropriations for that purpose.").

36. Pub. L. No. 106-31, Title III, § 3011, May 21, 1999, 113 Stat. 93, 93-94, as amended Pub. L. No. 106-113, Div. B § 1000(a)(2) [Title V, § 585], Nov. 29, 1999, 113 Stat. 1535, 1501A-117; Pub. L. No. 106-554, § 1(a)(2) [Title III, § 310], Dec. 21, 2000, 114 Stat. 2763, 2763A-119 ("Subject to the availability of appropriations, the head of the administering agency—(i) may contract with nongovernmental organizations having expertise

in carrying out the activities described in subsection (a) for the purpose of carrying out the administrative functions of the program (other than the awarding of grants) . . . .").

37. Pub. L. No. 103-322, § 130007(b)(1), Sept. 13, 1994, 108 Stat. 2024, 2029, as amended Pub. L. No. 104-208, Div. C, Title III, § 308(g)(5)(F), (10)(F), Title VI, § 671(a)(6), Sept. 30, 1996, 110 Stat. 3009-623, 3009-625, 3009-721 ("Subject to the availability of appropriations, the Attorney General may—(1) construct or contract for the construction of 2 Immigration and Naturalization Service Processing Centers to detain criminal aliens . . . .").

38. Pub. L. No. 102-484, Div. B, Title XXVIII, § 2822(a), Oct. 23, 1992, 106 Stat. 2608 ("Subject to the availability of appropriations therefor, the Secretary of Defense shall enter into a one-year contract with a private relocation contractor operating on a nationwide basis to test the cost-effectiveness of using national relocation contractors to administer the Homeowners Assistance Program.").

39. Pub. L. No. 102-135, § 2(a), Oct. 24, 1991, 105 Stat. 635 ("The Secretary of Commerce shall, within 30 days after the date of enactment of this Act, and subject to the availability of appropriations, contract with the National Academy of Sciences (hereinafter in this Act referred to as the 'Academy') to study—(1) means by which the Government could achieve the most accurate population count possible; and (2) consistent with the goal under paragraph (1), ways for the Government to collect other demographic and housing data.").

40. Pub. L. No. 111-281, Title III, § 307(d), Oct. 15, 2010, 124 Stat. 2927, 2928 ("The Secretary of the department in which the Coast Guard is operating may, subject to the availability of appropriations, enter into cooperative agreements, contracts, or other agreements with, or make grants to individuals and governments to carry out the purpose of this section or any agreements established under subsection (b).").

41. Pub. L. No. 105-277, Div. A, § 101(e) [Title IV, § 401], Oct. 21, 1998, 112 Stat. 2681-305, 2681-308, as amended Pub. L. No. 107-171, Title VI, § 6102(d)(5), May 13, 2002, 116 Stat. 419; Pub. L. No. 110-161, Div. F, Title IV, § 434, Dec. 26, 2007, 121 Stat. 2153; Pub. L. No. 111-8, Div. E, Title IV, § 428, Mar. 11, 2009, 123 Stat. 749 ("The Forest Service, subject to the availability of appropriations, may carry out any (or all) of the requirements of this section using private contracts.").

42. Pub. L. No. 94-329, Title IV, § 413(b), (c), June 30, 1976, 90 Stat. 761 ("Subject to the availability of appropriations therefor, the President is authorized to adopt as a contract of the United States Government, and assume any liabilities arising thereunder (in whole or in part), any contract which had been funded or approved for funding by the Agency for International Development prior to June 30, 1975 . . . .").

43. Pub. L. No. 103-236, Title V, § 573(c), Apr. 30, 1994, 108 Stat. 486 ("The Secretary of State shall, subject to the availability of appropriations, contract with appropriate individuals and organizations to carry out the purpose of the Office.").

44. Pub. L. No. 104-239, § 16(c)(3), Oct. 8, 1996, 110 Stat. 3133, 3138 ("Each contract with a shipyard under this section shall . . . be renewable, subject to the availability of appropriations, for each subsequent fiscal year through fiscal year 1998.").

45. Pub. L. No. 111-204, § 2(h)(2)(B)(iii), July 22, 2010, 124 Stat. 2228, 2228-89 ("In conducting recovery audits under this subsection, the head of an agency . . . may conduct recovery audits directly, by using other departments and agencies of the United States, or by procuring performance of recovery audits by private sector sources by contract (subject to the availability of appropriations), or by any combination thereof.").

46. Pub. L. No. 106-256, § 3(c)(2), Aug. 7, 2000, 114 Stat. 644, 646, as amended Pub. L. No. 107-206, Title I, § 206, Aug. 2, 2002, 116 Stat. 833; Pub. L. No. 107-372, Title III, § 306, Dec. 19, 2002, 116 Stat. 3096 ("In carrying out its functions under this section, the Commission . . . may enter into contracts, subject to the availability of appropriations for contracting . . . .").

47. Pub. L. No. 106-579, § 7(f)(1)(B), Dec. 28, 2000, 114 Stat. 3078, 3082, as amended Pub. L. No. 110-161, Div. H, Title I, § 1502(e), Dec. 26, 2007, 121 Stat. 2250 ("Subject to the availability of *appropriations, to carry out this Act,* the Chairperson or Vice Chairperson of the Commission or the Executive Director and White House Liaison may, on behalf of the Commission . . . enter into contracts, leases, and other legal agreements.").

48. Pub. L. No. 104-299, § 3(b), Oct. 11, 1996, 110 Stat. 3644 ("The Secretary of Health and Human Services shall ensure the continued funding of

grants made, or contracts or cooperative agreements entered into, under subpart I of part D of title III of the Public Health Service Act (42 U.S.C. 254b et seq.) (as such subpart existed on the day prior to the date of enactment of this Act), until the expiration of the grant period or the term of the contract or cooperative agreement. Such funding shall be continued under the same terms and conditions as were in effect on the date on which the grant, contract or cooperative agreement was awarded, subject to the availability of appropriations.").

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-551

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KENNETH L. SALAZAR, ET AL.,
Petitioners,

v.

RAMAH NAVAJO CHAPTER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICI* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are the Chamber of Commerce of the United States of America ("the Chamber") and the National Defense Industrial Association ("NDIA").[1]

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in – or itself initiates – cases that raise issues of vital concern to the Nation's business community.

NDIA is a non-partisan, non-profit organization with a membership of 1,765 companies and 96,296 individuals, including some of the nation's largest defense contractors. NDIA members contract to provide a wide variety of goods and services to the government. NDIA thus has a specific interest in government policies and practices concerning the government's acquisition of goods and services and its fulfillment of its contractual obligations.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties have consented to the filing of this brief.

The issues presented in this case could have profound implications for Chamber and NDIA members. The government's brief argues that the government may disregard its contractual promise to pay for services rendered simply because the government has exhausted the funding appropriation. The government is incorrect. As this Court recognized just a few years ago, more than a century of government contracts law holds that the government is not excused from payment of contract obligations simply because it has chosen to spend the appropriated funds on other projects. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 637-38 (2005) (citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

Amici filed in support of the tribal contractors in *Cherokee*. *See* Brief of *Amici Curiae* the Chamber of Commerce of the United States of America, *et al.*, in Support of the Cherokee Nation and Shoshone-Paiute Tribes, *Cherokee Nation of Okla. v. Thompson*, 543 U.S. 631 (2005) (No. 02-1472), 2004 WL 1386408. And they have a critical interest in ensuring that this Court reaffirms the government's reliability as a contracting partner. As Justice Jackson piquantly observed, "[i]t is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one way street." *Federal Crop Ins. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting). The government is seeking to avoid turning those square corners here. It has seized upon contractual language that is ubiquitous and claims that it has the extraordinary

effect of excusing the government from fulfilling its contractual promises. Were this Court to accept the government's position, it would upend decades of settled expectations of the government contracting industry, and ultimately frustrate the government's ability to contract with private companies. *Amici* thus urge the Court to affirm the decision below allowing the contractors to recover, and thereby reaffirm that when the government promises in its contracts to pay for services rendered, it must do so.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's brief is permeated by a fundamental misunderstanding about the question this case presents. The government argues repeatedly, in many different forms, that it is not obligated to pay the contractors for their work because agencies generally lack authority to spend in excess of the appropriations they are given. *E.g.*, Br. of the United States at 30 ("[F]ederal officials have no authority to obligate the United States to pay money in excess of authorized appropriations.").

The government is correct on one level: an agency typically is not permitted to make payments under a contract in excess of its available appropriations. Indeed, the government generally is required to obligate sufficient funds to the contract before entering into it. But that does not answer the questions that are central here: whether the government is in *breach* of contract if, having contracted, it fails to perform because the government has nonetheless spent the funds

elsewhere, and what *remedy* the contractor is entitled to for that breach. For a century, the answers to those questions have been clear. Under the venerable *Ferris* doctrine, affirmed by this Court just seven years ago in *Cherokee*, the government is not excused from paying a performing contractor on the ground that it has spent the appropriated funds elsewhere. Rather *Cherokee* agreed with the contractors (and the Chamber and NDIA as *amici*) that "[i]f the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose* or assumes obligations that exhaust the funds." *Cherokee*, 543 U.S. at 641 (*emphasis added; quotation marks omitted*). The *Ferris-Cherokee* doctrine recognizes that where an appropriation may be spent to support multiple contracts, it is singularly the government's responsibility to ensure – and singularly beyond the power of the contractor to confirm – that sufficient funds remain available for a contract. *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892). And a contractor who does not know – and cannot be expected to know – that the government has spent the funds elsewhere should not be penalized for having performed.

The government has no effective answer. It argues that a contracting officer may not unilaterally pay money in excess of an appropriation. But again, while that is generally true, it does not change the fact that the government is in breach when it fails to fulfill its contractual obligations, and the contractor is entitled to damages for breach payable from the

Judgment Fund. The government also argues that Congress supposedly used distinctive terms in the appropriation language at issue here to show that it did not intend to compensate contractors if the appropriated funds were spent elsewhere. But these arguments are red herrings. The language the government points to is not distinctive at all, but found in many, if not all, appropriations – *including the very appropriations at issue in Cherokee.*

For example, the government makes much of the fact that the appropriation in this case contained a provision stating that the contract was "subject to the availability of appropriations." Yet the government fails to mention that this language was also present in *Cherokee* where the Court – correctly – explained that it was not a license for the government to spend appropriated funds elsewhere or to breach contracts, but rather a term of art used to allow a contract to be drawn up while making its actual award contingent on sufficient funds being appropriated and made available for obligation. *Cherokee*, 543 U.S. at 643. The expectation is that Congress will appropriate sufficient funds. *See, e.g., Matter of Army Corps of Engineers' Continuing Contracts,* B-187278, Mar. 28, 1977, 56 Comp. Gen. 437, 77-1 CPD ¶ 265. And once the funds were appropriated – as they were in *Cherokee* and here – the government had no leeway to spend them elsewhere.

The government's other purported distinguishing factors are even more anodyne. The government stresses that the appropriation in this case was "not

to exceed" a certain amount. But virtually every appropriation is "not to exceed" the stated amount whether it uses that language or not, including the appropriation in *Ferris* itself. The very point of the rule in *Ferris* and *Cherokee* is that the government is not excused from payment even though the appropriation was limited.

Similarly, the government emphasizes that the appropriation in *Cherokee* was an "unrestricted lump sum." This too is true, but irrelevant. Both the *Cherokee* appropriation and the *Ramah* appropriation could be spent on multiple contracts (in the same way that countless other appropriations are). What matters is that the funds were obligated to multiple contracts and no one contractor could know that its contract's funds were spent elsewhere. Far from distinguishing this case from *Cherokee*, the appropriation here fits precisely into that mold.

It would have enormous destabilizing effects on the government contracting community if the entirely unremarkable appropriation language present here were found to excuse the government from paying performing contractors. These terms are seen in government contracts of all stripes, and they have never been thought to leave a contractor without a remedy. In reality, the government is asking this Court to overturn its unanimous decision in *Cherokee* from just seven years ago.

This Court should reject that invitation. Congress has a panoply of tools to rein in agencies that contract beyond their appropriations. Among other things, it may levy both administrative and

criminal punishments against contracting officers who obligate funds in excess of their appropriations. And of course Congress has a wealth of more informal tools to bring to bear against agencies that do not carry out its wishes.

But there is no basis in law or policy for making the contractor responsible for the government's refusal to pay, or its failure to subdivide and apportion appropriated funds as the law requires. The government's position would have the effect of making contracts illusory by giving it a broad right to refuse payment at the stated price for services rendered. This proposed regime is grossly unfair to contractors, but it also does not serve well the government, which will find it difficult to find contracting partners willing to take on such risk. Only this Court can correct the government's erroneous and ultimately destabilizing view, and *amici* urge it to do so.

ARGUMENT

I. How Government Contracts Work.

Because the government's argument misapprehends the basic structure of government contracting and the manner in which contracts are funded, it is important at the outset to review how government contracts are supposed to work, and in particular what consequences arise when a contracting officer obligates more funds than have been appropriated for the undertaking in question.

Under the Constitution, Congress is vested with the sole authority to make appropriations for

government expenditures. The Appropriations Clause states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. 1, § 9, cl. 7; *see, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (explaining that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress" (quotation marks omitted)). Thus, "under this system, Congress has the 'final word' as to how much money can be spent by a given agency on a given program."[2] 2 Government Accountability Office, Principles of Federal Appropriations Law 6-4 (3d ed. 2006) ("GAO Redbook").

In practice, Congress appropriates funds, which must then be subdivided as appropriate by the relevant agency before then being "obligated" to a contract. Under the Antideficiency Act, the contracting agency may face civil or criminal penalties if it obligates funds in excess of the amount available in the appropriation. 31 U.S.C. §§ 1341(a)(1)(A), 1511-1519.[3] As stated in the GAO

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[2] For a succinct summary of the law and regulations governing the funding of government contracts, *see* Jim Schweiter & Herb Fenster, *Government Contract Funding Under Continuing Resolutions*, 95 Fed. Cont. Rep. (BNA) 180, 180-82 (Feb. 15, 2011).

[3] This constitutionally mandated process may not be evaded by executive branch actions which would cause its contractors to perform their contracts with their own funds or would establish them as "volunteers". Both such evasions would violate the Antideficiency Act, which expressly forbids a federal officer or employee from "accept[ing] voluntary services for ... government" except in highly limited circumstances not present

Redbook, which is the government's own authoritative summary of federal funding law, agencies "may not ... commit the United States to make payments at some future time for goods and services unless there is enough money in the 'bank' to cover the cost in full. The 'bank' of course, is the available appropriation." GAO Redbook 6-37. Indeed, although the government fails to mention the point, the Antideficiency Act goes even further: absent an express statutory authorization, it prohibits, on pain of civil and criminal penalties, the very *making* of a contract that exceeds legally available funds. 31 U.S.C. § 1341(a)(1)(B); *Hercules v. United States*, 516 U.S. 417, 427 (1996); GAO Redbook 6-39.

The annals of government contracting law, however, are replete with evidence that government agencies do not always comply with their statutory fiscal obligations. One problem arises when, as is commonly the case, Congress appropriates a sum of money that is to be obligated to multiple contracts. In such a scenario, there is the potential for the contracting agency to "over-obligate," that is to obligate funds to several contracts which collectively total more than the appropriation, even though each contract individually is less than the appropriation.[4]

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here. 31 U.S.C. § 1342. And both would unlawfully "augment" the appropriations. *See* GAO Redbook 6-162 to 6-235.

[4] For a discussion of how the Antideficiency Act's subdivision requirements were a response to the problem of over-obligation and "coercive deficiencies," *see* Herbert L. Fenster & Christian

Black-letter law governs what happens when the government engages in over-obligation. The government, to be sure, has in general acted doubly unlawfully because a contracting officer may neither pay funds in excess of its appropriation, nor enter into a contract that is not fully funded The officer, for example, could face both criminal penalties or adverse personnel action under the Anti-Deficiency Act. 31 U.S.C. §§ 1341(a), 1350 (criminal fines up to $5,000 and imprisonment up to two years); *id.* § 1349(a) (punishment may include "administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office").

But the contractor is in a vastly different position. The contractor has contracted with the government and rendered performance. Although the government had over-obligated the appropriation, the contractor could not be expected know that was the case at the time the contract was awarded. From the contractor's perspective, the appropriation was sufficient to cover *its* contract.

In that situation, the law has been for 120 years that the contractor, having performed, is entitled to payment. It is true, as the government argues, that the agency cannot augment its appropriations, but neither can it foist upon contractors the burden of its shortfall. Instead, under the landmark holding of *Ferris*, which this Court expressly endorsed in

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Volz. *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Cont. L.J. 155 (1979).

Cherokee, the contractor will have an action for damages because "[a]s long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on the grounds of 'insufficient appropriations.'" *Cherokee*, 543 U.S. at 637-38 (citing *Ferris*, 27 Ct. Cl. at 546).

The *Ferris* case itself is illustrative of the principle. In *Ferris*, Congress appropriated $45,000 "[f]or improving the Delaware River below Bridesburg, Pennsylvania." Act of Mar. 3, 1879, 181, 20 Stat. 363, 364. The contractor entered into a $37,000 contract with the U.S. Army Corps of Engineers to dredge the river, but before the contractor completed performance, the Corps ordered him to stop because the appropriated funds had been spent elsewhere. When the contractor sued for damages, the Court of Claims rejected the government's argument that it was excused from performance because the appropriation was exhausted and held that the contractor was entitled to full damages.

> A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations *upon the Government's own agents*; it is a definite amount of money intrusted to them for distribution; *but its*

> *insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.*

Ferris, 27 Ct. Cl. at 546 (emphases added)

The *Ferris* doctrine has been applied literally dozens of times by the Court of Claims and its successor courts since it was first announced.[5] And the GAO Redbook states that it "is *settled* that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted." GAO Redbook 6-44 (emphasis added).

But the most relevant evidence of the vitality of the *Ferris* doctrine is surely this Court's recent decision in *Cherokee*. That case, like this one, considered an argument by the government that it should be excused from paying performing tribal contractors because it had spent the appropriated funds on other objectives. After citing the *Ferris* line of authority, this Court rejected that argument because

> it amounts to no more than a claim that the agency has allocated the funds to another

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[5] *E.g.*, *Ross Constr. Corp. v. United States*, 392 F.2d 984, 986-87 (Ct. Cl. 1968); *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966); *Lovett v. United States*, 66 F. Supp. 142, 146 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946); *Whitlock Coil Pipe Co. v. United States*, 71 Ct. Cl. 759, 761-62 (1931); *see also Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 570 (1997) (same); *N.Y. Cent. R.R. v. United States*, 65 Ct. Cl. 115, 128 (1928) (same), *aff'd*, 279 U.S. 73 (1929); *N.Y. Cent. & Hudson River R.R. v. United States*, 21 Ct. Cl. 468, 473 (1886).

> purpose, albeit potentially a very important purpose. If an important alternative need for funds cannot rescue the Government from the binding effect of its promises where ordinary procurement contracts are at issue, it cannot rescue the Government here, for we can find nothing special in the statute's language or in the contracts.

543 U.S. at 642. Accordingly, this Court recognized that although the over-obligation of funds by the government was improper, the contractor was still entitled to enforce the government's promise to pay for services rendered. Indeed, the Court cited the government's obligations under the Antideficiency Act to fully fund contracts before entering into them as a reason why the contractor is entitled to recover. *Id.* at 643 (citing 31 U.S.C. §§ 1341(a)(1)(A), (B)).

II. There Is No Material Distinction Between This Case and *Cherokee*, And It Would Have A Seriously Destabilizing Effect On Government Contracting If This Court Were To Adopt The Government's Arguments Now.

It is against this backdrop that the government argues that it should be excused from its promise to pay the tribal contractors in this case because it overcommitted its appropriation. The government contends that it is not liable because "federal officers have no authority to obligate the United States to pay money in excess of authorized appropriations." Br. of United States at 30.

As we have just seen, however, the fact that a federal officer is not supposed to obligate the United

States to pay amounts in excess of an available appropriation does not mean that the United States is excused from paying a performing contractor when it does over-obligate government funds. Regardless whether the government has acted illegally itself, under the *Ferris-Cherokee* line of cases, the performing contractor is entitled to recover damages for breach of contract.

The government acknowledges this line of authority, but contends that it does not apply to this case because the appropriation in question contained special features that indicated Congress's intent not to follow the normal *Ferris* rule. But this argument does not withstand scrutiny. The ostensibly distinguishing features the government identifies are routinely found in government contracts; indeed, some are present in *every* government contract. There would no longer be a *Ferris* doctrine – and *Ferris* and *Cherokee* themselves would have come out the other way – if the government's view were correct. Accordingly, this Court should reject the government's attempt to retract the protections for contractors that *Cherokee* reaffirmed.

We discuss each of the supposedly distinguishing features in turn.

1. "*Subject to the availability of appropriations.*" The government argues at length that the contractors are not entitled to recover because the appropriation directed to their program included the language that the contract was "subject to the availability of appropriations." Br. of the United States at 30-32. The government contends

that this phrase indicates that the government was not promising to fund the contract fully to the extent that the appropriation was insufficient to cover it. *Id.*

This is a remarkable argument. The very same language was present in *Cherokee* and, although the government's brief does not mention the fact, this Court squarely held that it did not excuse payment by the government. *Cherokee* discussed the term in some detail, observing that the "subject to the availability of funds" clause "normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year." The Court went on to reject the "special interpretation" urged by the government that such language amounted to a "grant of authority to the Secretary to adjust funding levels based on appropriations." 543 U.S. at 643-44. The Court concluded that the government's position amounted to a claim that it "had the legal right to disregard contractual promises," and it rejected it. *Id.* at 644.

The Court was correct to hold that a "subject to availability of funds" clause does not excuse the government from paying a performing contractor, and should not accept the government's contrary argument now. As the Comptroller General has stated, the effect of such language is to make the contract operative only when there is an

appropriation made sufficient to cover it.[6] *To the Secretary of the Interior*, 39 Comp. Gen. 340, 342 (1959); *see also Comptroller General Warren to the Postmaster*, 21 Comp. Gen. 864, 864-65 (1942). This is entirely consistent with the limited use of the phrase in the FAR. *See* 48 C.F.R. §§ 32.702, 32.703-2, 32.705-1; *see also* 48 C.F.R. § 52.232-18 (explaining that such provisions are to be used where a contract document is prepared for a planned award but funds for such contract will not become available until after the beginning of a new fiscal year). And it helps ensure that the government complies with its obligations under the Anti-Deficiency Act by not awarding a contract and obligating its funds until an appropriation covering the contract is made and sufficient funds are available. *See* 31 U.S.C. §§ 1341(a)(1)(B), 1511-1519.

"Subject to availability" clauses are commonplace in government contracting, and it would upend the settled expectations of government contractors of all stripes if this Court were to change course now and hold that they imbue the government with the power to refuse to pay a performing contractor to the extent the government wishes to spend the appropriated funds elsewhere. To take one example, such clauses are particularly common in defense contracts dependent on appropriation to be made, if at all, in a

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[6] The concept is variously expressed as "subject to the availability of funds," "subject to the availability of appropriations," and "contingent upon the availability of appropriated funds," among other formulations. There is no material difference in the effect of these phrases.

future fiscal year. *See* 48 C.F.R. §§ 32.703-2 & 32.705-1.[7] For all the reasons discussed above, a contracting officer cannot obligate funds to exercise an option in a later fiscal year until the relevant appropriation is made. But by using a subject to availability clause, the government can reserve the right to exercise that option if and when the appropriation is made at a later date. That is an entirely different interpretation than the one the government urges here, which is that the government has the right to escape payment once the funds have been appropriated and it *has* exercised the option.

2. "*Not to exceed.*" The government also contends that it is excused from paying the performing contractors because the appropriation states that it is "not to exceed" a given amount. Br. of United States at 26. This, too, is a remarkable argument because virtually *every* appropriation, by definition, sets a total amount that an agency may not lawfully exceed. And thus there would be no *Ferris* doctrine at all if such language were sufficient to allow the government to claim that it never promised to pay the contractor. Whether the phrase "not to exceed" is used or some other implied limitation is in place, appropriations are limited by their stated amount. As the GAO instructs, this formulation has the "same effect" as "[w]ords like

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[7] This case, like *Cherokee*, concerns a genre of contracts not subject to the FAR but, as this Court recognized in that case, FAR provisions are expressive of the intent of government contracts in general. *Cherokee*, 543 U.S. at 640.

'not more than' or 'not to exceed.'" GAO Redbook 6-29; *see also id.* 6-32 (describing the phrase "not to exceed" as "the most effective way to establish a maximum" sum available for a specified purpose).

The problem for the government is that *all* appropriations are limited. The *Ferris* doctrine would never have existed if this ubiquitous limitation barred recovery by a performing contractor. One need look no further than *Ferris* itself to see the point. In *Ferris*, the relevant appropriations language was: "For improving the Delaware River below Bridesburg, Pennsylvania, forty-five thousand dollars." Act of Mar. 3, 1879, 181, 20 Stat. 363, 364; *see Ferris*, 27 Ct. Cl. at 544. That appropriation clearly was not to exceed "forty-five thousand dollars" and yet the Court of Claims recognized that the government was still obligated to pay in full its contractors for the work they performed.

The government is thus simply wrong when it contends that "[t]he statutory 'not to exceed' caps distinguish this case from *Cherokee*." Br. of United States at 26. According to the government, this Court's decision on that case turned on the fact that Congress had "'appropriated sufficient *legally unrestricted* funds to pay the contracts at issue.'" *Id.* at 27 (quoting *Cherokee*, 535 U.S. at 636, 637) (emphasis added by government). But the funds in *Cherokee* were not "legally unrestricted" in the sense that the contracting officers were free to spend in excess of the appropriated amounts. In *Cherokee*, as here, and as with all government contracts, Congress

appropriated a certain amount of funds for the program. In *Cherokee*, those funds were unrestricted in the narrow sense that the agency could spend them on a variety of enumerated ends encompassed within the stated objectives of the program. But they were "capped" in the important sense that the agency could not spend *more* than the appropriation on those ends. It was against that backdrop that this Court concluded that even though the agency could not spend more than the lump sum that was appropriated to it, under *Ferris* the contractors were entitled to recover damages from the judgment fund for the work they performed under the *Ferris* doctrine.

The ramifications of the government's argument are stark and alarming to the government contracting community. The government seeks to take a defining feature of appropriations – that they are limited – and turn it into a license to escape a promise to pay for services rendered. No contractor could contract with any confidence with the government under such a regime, and this Court should reject the government's attempt to impose it.

3. "*Unrestricted lump sum.*" The government also lays heavy stress on the fact that *Cherokee* involved a "lump sum" appropriation. Br. of United States at 49. Again, the government misunderstands the relevant contracting and funding concepts. A lump sum appropriation is one in which the contracting entity is free to divide the appropriation – but not amounts in excess of the appropriation – as it sees fit among approved objectives. GAO Redbook 6-5. The

government deems the appropriation here a "line item appropriation." But even if that terminology were correct (and it is not, *see* Br. of Respondents at 34),[6] a line item appropriation may *also* be spent on a variety of approved objectives, depending on the nature of the line item. That was precisely what occurred here. GAO Redbook 6-26. The appropriation at issue here, in entirely typical fashion, was intended to pay multiple tribal contractors. There is no material difference between such an appropriation and a "lump sum" appropriated to pay multiple contractors. Thus, just as this Court observed in *Cherokee* that the "Government normally cannot back out of a promise to pay on grounds of insufficient appropriations ... even if an agency's total lump sum appropriation is insufficient to pay *all* the contracts the agency has made," 543 U.S. at 637, so too the government cannot back out of its promise where the appropriation takes the form of a line item dedicated to multiple contractors.

To be sure, some appropriations are not subject to this rule. Where an appropriation is designated for a single purpose to be accomplished by a single contract, then the contractor necessarily has notice, at the time of contracting, that the appropriated

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[6] See also 2 GAO Redbook at 6-15 (explaining that the "$244 million appropriation in the *Newport News* case could be viewed as a line-item appropriation in relation to the broader 'Shipbuilding and Conversion' category, but it was also a lump-sum appropriation in relation to the two specific vessels included").

amount must be sufficient to cover the contract. A contractor who performs knowing that the appropriation is insufficient does not have a right to recover under *Ferris*. Instead, under the rule announced in *Sutton v. United States*, the contractor has no recourse for damages if the funds appropriated are insufficient to satisfy the government's payment's obligation. 256 U.S. 575, 577-79 (1921).

In sum, there is nothing in this case to distinguish it from *Ferris, Cherokee*, or any of the dozens of other government contracting cases over the years that have not excused the government from liability when it is unable to perform because it has spent appropriated funds elsewhere. And there is nothing in the contract language or form of the appropriation in this case to distinguish it from a huge number of existing government contracts, across industries undertaken by contractors large and small. Were the Court to adopt the government's view, the government's obligation to perform under all of those contracts would be called into doubt. Again, this Court should reject the government's invitation to undo settled principles that contractors rely upon every day.

III. The Government's Proposed Rewriting Of Government Contracting Law Would Harm Private Contractors, Undermine The Government's Reliability As A Contracting Partner, And Increase The Costs Of Government.

In the absence of any distinguishing features in this case, *see supra* Part II, the government is effectively asking this Court to reverse the *Ferris* doctrine itself. But this doctrine has not just been the law for 120 years, it is also sound policy. On the one hand, it recognizes that Congress has numerous tools to prevent wayward agencies from contracting in excess of their appropriations. On the other hand, the doctrine recognizes that if the government could escape its contractual obligations simply by spending appropriated funds on other projects, then government contracts would in effect be illusory. In such a world, contractors would of course suffer, but so would the government, which would find it difficult to attract contracting partners to serve its needs.

First, under *Ferris*, a performing contractor has the right to be paid, and to hold the government liable for breach if it does not perform. But this does not mean that Congress's power of the purse is compromised. On the contrary, Congress has a wealth of tools at its disposal to curb the over-obligation of government funds. Most obviously, Congress may appropriate funds in ways that leave no doubt about the amount of money obligated to a particular contract. A contractor who enters into a

contract with a payment in excess of that appropriation has no claim for additional payment when the appropriation turns out to be insufficient. *See supra*.

On top of this, the Antideficiency Act imposes a rigorous set of procedures to minimize deviations, and the contracting agent who over-obligates federal funds may expose himself to criminal sanctions and adverse personnel consequences, such as termination or leave without pay. *See supra*. These penalties provide a strong deterrent, and they are joined by the political pressures that Congress may bring to bear on a wayward agency. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("[W]e hardly need note that an agency's decision to ignore congressional expectations may expose it to grave political consequences.").

The alternative espoused by the government in this case is far more problematic. If the government may escape performance after promising to perform, then it has not promised anything at all. Such a contract is illusory. *United States v. Winstar Corp.*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring) ("A promise to pay, with a re-served right to deny or change the effect of the prom-ise, is an absurdity." (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878))). The effects of such a rule could be devastating to the contracting community, and in the long run to the government, which purchases $425 billion of goods and services each year, including nearly $100 billion from small businesses. *See* http://archive.sba.gov/contractingopportunities/index.html; http://www.

sba.gov/category/navigation-structure/counseling-training/online-small-business-training/contracting.

The risks are plain. For contracts already in existence, adoption of the government's position could cause massive injury to the contractor, who may now have no recourse when the government informs the contractor that it has spent the appropriated funds it owes elsewhere. And going forward, even assuming a contractor is willing to take on the risk of contracting with the government at all in the face of such uncertainty, it will have no choice but to insist on contractual language that will bind the government – assuming the government would even accept such language under its new view – or demand a risk premium. In either case, the government's interests are disserved. In the former, it will threaten its ability to contract in advance of appropriations. In the latter, it will undermine the pricing discounts it enjoys as a result of its reputation as a reliable bill-payer. In sum, upending settled law here will undermine government reliability for decades to come – causing some government contractors to forgo the process altogether, and the ones who remain to factor the risk into their contract prices. No one – not contractors, nor the government, nor the public – will benefit from the undoing of *Ferris*, and this Court should reject the government's invitation to go down that path.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision below.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-551

IN THE

Supreme Court of the United States

KEN L. SALAZAR,
SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

RAMAH NAVAJO CHAPTER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AND A COALITION OF INDIAN TRIBES AND TRIBAL ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

The National Congress of American Indians was founded in 1944 and is the oldest and largest tribal government organization in the United States.[1] NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments. NCAI and its members have considerable experience with the history and operation of self-determination contracts under the Indian Self-Determination and Education Assistance Act.

Amici the Alaska Native Tribal Health Consortium, the Chickasaw Nation of Oklahoma, the Choctaw Nation of Oklahoma, the Confederated Tribes of Grand Ronde, the Kodiak Area Native Association, the Southcentral Foundation, the SouthEast Alaska Regional Health Consortium, and the Tanana Chiefs Conference are Tribes and tribal organizations that, like respondents, have contracted with the federal government under the Indian Self-Determination and Education Assistance Act to operate various facilities and activities of the U.S. Indian Health Service, the Bureau of Indian Affairs, or both, and that have damage claims pending against the government arising out of unpaid contract support costs.

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[1] No counsel for a party authored this brief in whole or in part. No person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been submitted to the Clerk.

Amici submit this brief in order to help the Court understand why ordinary rules relating to the recovery of damages by unpaid government contractors apply here with particular force given the specific history of the ISDA and the federal policy of tribal self-determination.

SUMMARY OF ARGUMENT

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, directs the Secretary of the Interior to enter into contracts with Indian tribal governments providing for, among other things, the full payment of specified contract support costs. The Secretary argues that those contracts do not actually obligate the government to pay a Tribe the amount of support costs specified in the contract, if the total of the costs incurred by all contracting Tribes in a given year exceeds the total amount included for this purpose in the appropriation for the Department of the Interior for that year. In that event, the government contends, the Secretary may allocate available funds among contracting Tribes, deciding in his discretion whether to pay each Tribe's costs in full, in part, or not at all. The ISDA's history helps show the error of that contention.

First enacted in 1975, the ISDA was a significant practical step in Congress's turn away from failed policies of the past and toward a policy of promoting tribal independence and self-determination. In support of that goal, the Act envisioned transferring to each willing Tribe both the responsibility for implementing federal programs benefiting the Tribe and the resources necessary for that purpose.

This brief traces relevant changes in the ISDA through two significant congressional revisions, in 1988

and 1994. In amending the Act, Congress more and more clearly required the Secretary to undertake, in each ISDA contract, a legal obligation to pay full contract support costs. Congress chose to require the making of those contractual commitments with the express intention that a contracting Tribe would have the same legal remedy for non-payment as would be available to a contractor for the breach of any other government contract. And in doing so, Congress also eliminated all secretarial discretion in the funding of self-determination contracts.

Against these general and specific historical backdrops, the argument offered by the Secretary here is not a plausible way of reconciling Congress's emphatic directions that the Secretary agree to pay each Tribe's full contract support costs with the limitations it has separately imposed, in particular years, on the overall amount available to the Secretary for that purpose. In particular, the Secretary's assertion of administrative discretion to pick and choose which contracting Tribes will be reimbursed for their costs and in what amounts is antithetical to the text and history of the ISDA. Moreover, if there were any ambiguity in that regard, the doubt would have to be resolved against the government based on interpretive principles that are both incorporated in the text of the ISDA and deeply rooted in federal Indian law. Accordingly, the government must be held to the agreements it has made with each ISDA Tribe. If annual appropriations are collectively inadequate to fund full payment under all ISDA contracts and the Secretary thus cannot pay a particular Tribe, that Tribe has a claim for breach of contract and a right to recover damages for the breach, just as would any other government contractor.

ARGUMENT

The ISDA "direct[s]" the Secretary to enter into a self-determination contract with each qualified Tribe that wishes to assume direct operation of a federal program that would otherwise be administered by the Secretary for the benefit of that Tribe and its members. 25 U.S.C. §450f(a)(1). As amended in 1988 and 1994, the Act imposes very specific requirements concerning the amounts the Secretary must agree to pay under such a contract. *Id.* § 450j-1. In particular, the Secretary "shall add" to each contract "the full amount of funds to which the contractor is entitled under" the Act, *id.* § 450j-1(g), and that amount "shall" include "contract support costs" as defined in the Act, *id.* § 450j-1(a)(2). These requirements are reflected in every ISDA contract the Secretary signs with an individual Tribe. *See id.* § 450*l*(c) (model agreement § 1(c)(2)).

The government argues in this case—essentially as it did in *Cherokee Nation of Oklahoma* v. *Leavitt*, 543 U.S. 631 (2005)—that these contractual provisions create no binding obligation to pay any given Tribe the amount of contract support costs required by the statute and promised in the Tribe's ISDA contract. *See, e.g.*, Pet. Br. 36-54. Where Congress has appropriated a specific amount for the Secretary to use to pay all contract support costs during a fiscal year and that amount proves insufficient to pay the costs owed to *all* tribal contractors, the government argues that *no* contractor has any enforceable right to even partial payment. *See, e.g., id.* at 45. Rather, it contends, the government's overall liability is capped at the amount of the appropriation; and that amount may be parceled out among contracting Tribes in whatever manner the Secretary, in his discretion, may decide. *See id.* at 8-9, 52.; *see also* Resp. Br. 9-10 (giving examples of disparate allocations

the Secretary has made in practice); Arctic Slope Amicus Br. 3-7.

Respondents' brief explains why this theory that payment may become effectively discretionary cannot be squared either with *Cherokee Nation* or with fundamental principles of government contract law. Among other points, the government's argument was rejected over a century ago in *Ferris* v. *United States*, 27 Ct. Cl. 542, 546 (1892), which holds that the insufficiency of an overall appropriation to cover all contractual obligations incurred by the government for an authorized purpose "does not ... cancel" those obligations as to any individual contractor. While it may be true that the Secretary cannot make additional support-cost payments to any ISDA tribal contractor once any overall limit on an appropriation for that purpose has been reached, his inability to "mak[e] ... further payments" on an otherwise valid contract with a particular Tribe does not excuse the United States from liability for the consequent breach. U.S. Gov't Accountability Office, II *Principles of Fed. Appropriations Law* 6-44 (3d ed. 2006). Rather, the government's contractual obligation to each unpaid Tribe "remain[s] enforceable in the courts" through a damages action. *Id.*; *Cherokee Nation*, 543 U.S. at 637.

As this brief explains, the ISDA's context and history further highlight the error of the Secretary's contrary contention. The Act is a cornerstone of the national policy of tribal self-determination. The evolution of its provisions from enactment in 1975 through substantial amendments in 1988 and 1994 reveals that Congress repeatedly *stripped* the implementing federal agencies of any discretion, including specifically with respect to the full payment of contract support costs. It sought instead to compel implementation by requiring

the Secretary to undertake binding contractual commitments, subject to ordinary remedies for breach. Against this background, it is clear that the Secretary's proposal of a *de facto* return to broad administrative discretion in the payment of ISDA contract support costs is inconsistent with congressional intent.

I. CONGRESS HAS PROGRESSIVELY CONSTRAINED ADMINISTRATIVE DISCRETION UNDER THE ISDA, INCLUDING BY REQUIRING INCLUSION OF FULL CONTRACT SUPPORT COSTS IN ISDA CONTRACTS

A. The ISDA Was Initially Enacted As A Cornerstone Of A New Federal Policy Of Tribal Self-Determination

As this Court is well aware, federal policy concerning relations with the Indian Tribes has passed through many phases over time. *See, e.g., United States* v. *Lara*, 541 U.S. 193, 201-203 (2004). The important point for present purposes is that when the ISDA was enacted in 1975, it embodied a radical change in previous policies that had reflected at best an enervating federal paternalism and at worst an express policy of terminating the legal recognition of tribal identity. In a landmark message to Congress in 1970, President Nixon called for a new approach, "explicitly affirm[ing] the integrity and right to continued existence of all Indian tribes."[2] Under the new regime, the United States reaffirmed its responsibility to Indian peoples, but increasingly sought to discharge that responsibility by rebuilding tribal leadership and institutions and inter-

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[2] Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 567 (July 8, 1970); *see also, e.g.*, Cohen, *Handbook of Federal Indian Law*, § 1.07, at 97-113 (5th ed. 2005).

acting with Tribes on a government-to-government basis. *See Lara*, 541 U.S. at 202; *Ramah Navajo Sch. Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 840 (1982) ("in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation"). For the last forty years, federal Indian law has embodied and sought to further that policy of tribal self-determination.

The self-determination policy found concrete expression in a number of new federal statutes, including the ISDA. *See, e.g., Ramah*, 458 U.S. at 840.[3] In enacting the Act in 1975, Congress found that:

> [T]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities[.]

Pub. L. No. 93-638, §(2)(a)(1), 88 Stat. 2203 (1975) (codified at 25 U.S.C. § 450(a)(1)). Congress recognized the "obligation of the United States to ... assur[e] maximum Indian participation in the direction of ... Federal

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[3] *See also* Cohen, *supra* n.2, § 1.07, at 103-113 (discussing the ISDA and other "Self-Determination Era" statutes, such as the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; the Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 450a-458aa; and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, among others).

services to Indian communities so as to render such services more responsive to the needs and desires of those communities." *Id.* § 3(a), 88 Stat. 2203-2204 (codified at 25 U.S.C. § 450a(a)) (App. 1a). And it

> declare[d] its commitment to ... the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

Id. § 3(b), 88 Stat. 2204, (codified at 25 U.S.C. § 450a note) (App. 1a).[4]

Toward that end, Congress "directed" the Secretaries of the Interior and of Health, Education, and Welfare "to enter into a [self-determination] contract or contracts" with any qualified Tribe that so requested. *Id.* §§ 102-103, 88 Stat. 2206-2207 (App. 1a-2a). These contracts were designed to transfer to the Tribe the responsibility and resources "to plan, conduct, and administer [federal] programs" that would otherwise be provided for Indians by the Secretaries, either directly or through similar contracts with States or state agencies. *Id.*

In keeping with this purpose, the Act included extensive provisions to facilitate the transfer of federal personnel to tribal supervision or employment. *Id.* § 105, 88 Stat. 2208-2210; *see* 25 U.S.C. § 450i & codifi-

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[4] For the Court's convenience, we have reprinted in an appendix to this brief selected provisions of the ISDA, as originally enacted and then as amended in 1988 and 1994.

cation note. As to funding, it provided that the amount paid under each contract "shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof" covered by a contract. ISDA § 106(h), 88 Stat. 2211-2212 (App. 3a). Finally, as to administration, the Act initially gave the relevant Secretaries broad discretion to determine how best to effectuate Congress's goals. *See id.* § 107(a), 88 Stat. 2212 (App. 3a) (subject to certain consultation requirements and time limits, Secretaries "are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title").

It is important to emphasize that nothing in the ISDA was intended to transfer the ultimate responsibility for *funding* contracted programs from the federal government to the Tribes. These were still *federal* programs. What the ISDA aimed to change was the way that these federal programs were administered. It was a direction to the federal agencies that had been running them to turn their operation over, on request, to tribal governments—thus reducing the agencies' own operations. Perhaps not surprisingly, that policy turned out to be more easily articulated than enforced.

B. In Its First Review Of ISDA Implementation, Congress Concluded That Federal Agencies Had Failed To Reimburse Tribes For Indirect Costs Of Administering Federal Operations

A dozen years after the initial enactment of the ISDA, Congress undertook a "comprehensive reexamination" of the Act. S. Rep. No. 100-274, at 1 (1987) (1988 Rep.). That review of how the Secretaries had implemented the Act during its first decade led to a number of

pointed revisions. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988 Amendments); *see* App. 5a-13a.

The Senate Report addressing the 1988 Amendments first noted that the ISDA was intended "to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities." 1988 Rep. 1.[5] The Committed recognized "remarkable progress" toward that goal (*id.* at 6; *see id.* at 4-6), but also identified significant problems with the implementation of the Act (*id.* at 6-8).

The Committee stressed that when Congress passed the ISDA, it "envisioned a clear-cut transfer [to Tribes] of federal responsibilities as well as federal financial, administrative, technical and other resources." 1988 Rep. 6. The Act's original provisions, however, relied heavily on administrative discretion, and required only that contract funding be "not less than" the amount a Secretary would have provided for his "direct operation" of a program (88 Stat. 2211 (§ 106(h)); App. 3a). In light of experience, the Committee identified two principal obstacles that had "interfered with the contractual relationship contemplated by the Act." 1988 Rep. 7.

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[5] The 1988 amendments originated in the House of Representatives as H.R. 1223. The Senate Report addressed a companion bill, S. 1703. The Senate ultimately passed the House bill after amending it to conform in large part to the Senate bill. 134 Cong. Rec. 12860-12862 (1988). The House concurred in part in the Senate amendments, and the Senate accepted the House's changes. 134 Cong. Rec. 23335-23341, 24038-24043 (1988); *see* 102 Stat. 2298 legis. hist. note; 1988 Rep. 1.

First, "[i]nappropriate application of federal procurement laws and federal acquisition regulations to self-determination contracts ha[d] resulted in excessive paperwork and unduly burdensome reporting requirements." 1988 Rep. 7. This increased the cost of transferring functions under the Act (*see id.* at 7-8, 9), created a federal "contract monitoring bureaucracy" (*id.* at 7), reduced the funds available to the Tribes for the federal functions they had contracted to discharge, and "inject[ed] uncertainty into the planning and management of tribal programs" (*id.* at 8).

Second, the Committee identified "[p]erhaps the single most serious problem with implementation of the Indian self-determination policy" as "the failure of the [Secretaries] to provide funding for the indirect costs associated with self-determination contracts." 1988 Rep. 8; *see id.* at 8-13. It explained (*id.* at 8-9):

> The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility.

In this regard, the Committee emphasized that under self-determination contracts, Tribes were "operating federal programs and carrying out federal responsibilities." 1988 Rep. at 9. They "should not be forced

to use their own financial resources to subsidize federal programs." *Id.* Moreover, to the extent that contracting with Tribes might entail additional administrative costs at the tribal level, such expenditures directly served a "fundamental objective of the federal policy of Indian self-determination," which is "to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members." *Id.* at 5; *see id.* at 4 (improvement in tribal government administrative capabilities was financed in part by "indirect cost reimbursement associated with self-determination contracts"). Finally, the Committee repeatedly faulted the Secretaries for "fail[ing] to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts." *Id.* at 9; *see id.* at 12, 13.

In sum, the Committee expressed frustration with the way the Secretaries had administered the largely discretionary funding provision of the original Act:

> The Federal Government would not consider it proper to short-change funding for contracts with private suppliers of goods and services. When the Bureau of Indian affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

1988 Rep. 13. In response, it declared its intention to amend the ISDA in a manner designed "to require the [Secretaries] to comply with the requirement of the Act

that indirect costs be added to the amount of funds available for direct program costs." *Id.* at 12.

C. The 1988 Amendments Cut Back Sharply On Secretarial Discretion Regarding The Administration And Funding Of ISDA Contracts

The 1988 Amendments themselves directly reflect Congress's concern with furthering the transition from federal to tribal administration, while ensuring proper funding of the indirect costs incurred by Tribes because of that transition. The amendments also added important provisions reaffirming the contractual nature of ISDA agreements and expressly providing that they were to be enforceable in the same manner as other government contracts.

1. Promoting transition to tribal administration

To begin with, the amendments added a new sentence to the Act's "declaration of policy": "In accordance with this policy [of self-determination], the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 1988 Amendments § 102, 102 Stat. 2285 (amending ISDA § 3(b), 25 U.S.C. § 450a(b)); App. 5a. This newly articulated commitment reflects Congress's understanding that ISDA funds spent on the indirect costs that tribal governments incur in administering federal contracts serve the ISDA's purpose of enhancing tribal self-determination.

At the same time, Congress took a number of steps to streamline, clarify, and expand the scope of federal programs and functions subject to transition to Tribes

under ISDA contracts.[6] As part of that effort, the Senate Committee sought to counteract administrative reluctance to transfer certain programs or functions. It explained, for example, that in light of the amendments the Secretaries were "not to consider any program or portion thereof to be exempt from self-determination contracts," and that contracted operations could include a wide range of administrative tasks that would otherwise be performed by the federal agencies. 1988 Rep. 23-24.

The 1988 Amendments also responded to the Secretaries' failure to use their previous discretionary authority to exempt ISDA contracts from federal procurement procedures. *See* 1988 Rep. 7. Congress now specified that "no contract entered into pursuant to this Act shall be construed to be a procurement contract," 1988 Amendments § 103, 102 Stat. 2286 (adding ISDA § 4(j)), and added a proviso directing that, except for construction contracts, "the Office of Federal Procurement Policy Act ... and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts." 1988 Amendments § 204, 102 Stat. 2291 (redesignating and amending ISDA § 105(a), codified as later further amended at 25 U.S.C. § 450j(a)).

In addition, in three places Congress mandated that any federal administrative requirement for entering into or monitoring ISDA contracts, including record-keeping and reporting requirements, must be promulgated through notice-and-comment rulemaking.

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[6] *See, e.g.*, 1988 Amendments § 201, 102 Stat. 2288 (amending ISDA § 102 and repealing or redesignating § 103; consolidating sections dealing with different federal agencies) (codified as later further amended at 25 U.S.C. § 450f(a)(1)); App. 7a-8a.

1988 Amendments §§ 104, 207, and 208, 102 Stat. 2287, 2295, 2296 (amending and redesignating ISDA §§ 5, 107, and 108, codified as later further amended at 25 U.S.C. §§ 450c, 450k, and 450c(f)); *see* App. 6a, 12a. As the Senate Committee explained at some length, these amendments were intended in part "to prevent Federal agencies from imposing unnecessary contract compliance and reporting requirements on tribal contractors through the use of administrative policy directives," internal manuals, and the like. 1988 Rep. 20; *see id.* at 20-22, 39. They also provided a framework and schedule for the Secretaries to cooperate with Tribes in developing appropriate regulations to replace the cumbersome procurement rules that the Secretaries had previously applied. *Id.* at 38. The Committee noted its expectation that the new regulations would be "relatively simple, straightforward, and free of unnecessary requirements o[r] procedures." *Id.* The Act itself required that they be promulgated within 10 months. 1988 Amendments § 207(b), 102 Stat. 2295-2296 (amending ISDA § 107(b), codified as later further amended at 25 U.S.C. § 450k(b)); App. 12a.

2. Contract funding

As to the question of contract funding, central here, the 1988 Amendments replaced the original Act's one-sentence subsection dealing with funding with a lengthy new section, largely concerned with contract support costs. 1988 Amendments § 205, 102 Stat. 2292 (adding a new ISDA § 106, codified as later further amended at 25 U.S.C. § 450j-1); App. 9a-11a. As noted above, the original provision had merely specified that contract funding must "not be less" than the relevant Secretary would have spent on a contracted operation—essentially leav-

ing other funding questions to the relevant Secretary's discretion. ISDA § 106(h), 88 Stat. 2211; App. 3a.

In stark contrast, the new provision specifically recognized that contracting Tribes would incur "contract support costs," and required that those costs "be added to" the base funding amount—if the tribal contractor requested the addition. 1988 Amendments § 205, 102 Stat. 2294 (codified as later amended at 25 U.S.C. § 450j-1(a)(2), (g)) ("Upon the approval of a self-determination contract and at the request of an Indian tribe or tribal organization, the Secretary shall add the indirect cost funding amount"); App. 9a, 11a. It further set out, in remarkable detail, a number of grounds that a Secretary was specifically *prohibited* from advancing as justifications for reducing the contract funding provided to a Tribe. *See* 25 U.S.C. § 450j-1(b) (App. 9a-10a). These forbidden grounds included "mak[ing] funding available for contract monitoring or administration by the Secretary"; "pay[ing] for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring"; and "pay[ing] for the costs of Federal personnel displaced by a self-determination contract." *Id.*

The amendments thus imposed strict statutory prohibitions against what had previously been treated as funding allocations lying within the Secretaries' discretion. They also added several provisions addressing specific indirect-cost issues, including requiring the Secretary to submit an annual report to Congress that was to detail, among other things, "any deficiency of funds needed to provide required indirect costs to all contractors for [each] fiscal year." 1988 Amendments § 205, 102 Stat. 2293 (adding ISDA § 106(c)-(i), including § 106(c)(2), codified as later further amended at 25

U.S.C. § 450j-1(c)-(i), including § 450j-1(c)(2)). As the Senate Report confirms, these changes were intended to "protect[] contract funding levels provided to tribes, and prevent[] the diversion of tribal contract funds to pay for costs incurred by the Federal government." 1988 Rep. 30; *see id.* at 30-34.[7]

3. Contract enforcement

A final aspect of the 1988 Amendments of special significance here is Congress's approach to the question of contract enforcement. The Senate Report indicates that the Committee:

> considered deleting the term "contract" and using another term such as "self-determination grant" or "intergovernmental agreement." Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party.

1988 Rep. 19. Indeed, the 1988 Amendments reinforced the contractual nature of ISDA funding, adding to the statute a new section expressly providing for applica-

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[7] The 1988 Amendments also introduced two limited qualifications on the government's obligations: "the provision of funds under this Act is subject to the availability of appropriations," and "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe" under the ISDA. 25 U.S.C. § 450j-1(b); App. 10a. The government relies heavily on these provisions in this case. *See, e.g.*, Pet. Br. 40. Respondents' brief explains in detail why that reliance is misplaced. *See, e.g.*, Resp. Br. 25-27, 49.

tion of the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*, and judicial enforcement in either district courts or what is now the Court of Federal Claims. 1988 Amendments § 206, 102 Stat. 2294-2295 (adding ISDA § 110, codified as later further amended at 25 U.S.C. § 450m-1); App. 13a. The Senate Committee explained that these provisions would afford "ISDA contractors the procedural protections now given other federal contractors by that Act." 1988 Rep. 36.

The Committee made clear its conclusion that these provisions were "necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the [ISDA]." 1998 Rep. 37. Indeed, the Committee put the point bluntly:

> The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated *particularly in the area of funding indirect costs*. Existing law affords such contractors no effective remedy for redressing such violations.

Id. (emphasis added).

In sum, the 1988 Amendments sought to promote the transition from federal to tribal administration of federal programs; directed the Secretary to pay for the tribal indirect costs entailed by that transition; and expressly gave ISDA Tribes the right to pursue powerful contract remedies on a par with other government contractors. These amendments substantially constrained the discretion that the Secretaries had previously exercised in implementing the ISDA. They were, however,

"necessary in order to meet the challenge presented by the tribes: to fully support the successful implementation of the federal policy of Indian Self-Determination." 1988 Rep. 13.

D. The 1994 Amendments Reflect Congress's Final Decision To Eliminate Executive Discretion With Respect To ISDA Contracts And To *Provide For* Full Contract Support Costs

In 1994, Congress again reviewed the Secretaries' performance in implementing the ISDA. It did not like what it found.

The 1994 Senate Report tersely recalls the same Committee's 1988 conclusion that the ISDA had "failed to meet its goal of reducing the federal bureaucracy and ending the federal domination of Indian programs," and had instead "spawned an increase in federal officials who were employed to monitor self-determination contracts." S. Rep. No. 103-374, at 2 (1994) (1994 Rep.). The 1988 amendments had been required because "the original goal of ensuring maximum tribal participation in the planning and administration of federal services" had been "undermined by excessive [federal] bureaucracy and unnecessary contract requirements." *Id.*

In 1988, Congress had acted to "remove ... administrative and practical barriers." 1994 Rep. 2. The Committee had expected new implementing regulations to be issued quickly, and to be "relatively simple, straightforward, and free of unnecessary requirements." *Id.* (internal quotation marks omitted). Yet, although the Act required that those regulations be issued within 10 months (*see* 1988 Amendments § 207, 102 Stat. 2296 (enacting ISDA § 107(b)(4), codified as later further amended at 25 U.S.C. § 450k); App. 12a, the Secretaries had not published even proposed regu-

lations until January 20, 1994. Moreover, those proposed rules contained "hundreds of new requirements," and were in many instances "more restrictive than existing regulations and raise[d] new obstacles and burdens for Indian tribes." 1994 Rep. 3 (internal quotation marks omitted); *see id.* at 14 (Secretaries "fail[ed] ... to respond promptly and appropriately to the comprehensive amendments developed by this Committee six years ago .... It is this unfortunate experience that is a major impetus for this bill.").

Congress's reaction was unequivocal. Disregarding the Executive's "strong[] oppos[ition]" (1994 Rep. 16), it passed a second extensive revision of the ISDA. Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108 Stat. 4250 (1994 Amendments); *see* App. 14a-25a. The express purpose of the amendments was to "limit the promulgation of regulations under the [ISDA] and to prescribe the terms and conditions which must be used in any self-determination contract." 1994 Rep. 1. The changes addressed familiar concerns, but with a new unwillingness to entrust any part of their resolution to secretarial discretion.

The original ISDA, for example, had required contracting Tribes to submit annual reports including "such ... information as the appropriate Secretary may request." ISDA § 108, 88 Stat. 2212; App. 4a. The 1988 Amendments restrained the burdensomeness of such "request[s]" by requiring that they be made through public rulemaking. 1988 Amendments § 208, 102 Stat. 2296; App. 6a. In 1994, Congress simply specified one particular form of required audit. 1994 Amendments § 102(2), 108 Stat. 4250-4251 (codified at 25 U.S.C. § 450c(f)); App. 14a. Beyond that, the 1994 amendments permitted the Secretary to collect additional in-

formation only to the extent he was able to "negotiate" such a requirement with the tribal contractor. *Id.*

Similarly, the 1988 Senate Report had indicated an intent that the Secretaries accept tribal proposals to contract for administrative functions, no matter at what organizational level the Secretary would have performed them. 1988 Rep. 23-24. The 1994 Amendments spelled the requirement out in statutory text—indeed, in two key places. *See* 25 U.S.C. § 450f(a)(1), as amended by 1994 Amendments § 102(5), 108 Stat. 4251 ("The programs, functions, services, or activities that are contracted ... shall include administrative functions ... without regard to the organizational level within the [federal] Department that carries out such functions.") (App. 15a); 25 U.S.C. § 450j-1(a)(1), as amended by 1994 Amendments § 102(14), 108 Stat. 4257 (contract funding "shall not be less than the ... Secretary would have otherwise provided for the [contracted] operation ... without regard to any organization level within the [federal] Department ... at which the [operation] ..., including supportive administrative functions that are otherwise contractable, is operated") (App. 18a).

The 1994 Amendments also substantially tightened direct statutory control over the standards and process under which the Secretary may decline to enter into an ISDA contract proposed by a Tribe. *See* 1994 Amendments § 102(6)-(7) and (9), 108 Stat. 4251-4253 (amending or adding ISDA § 102(a)(2) and (4), (b)(3), and (e), codified as later further amended at 25 U.S.C. § 450f(a)(2) and (4), (b)(3), and (e)); App. 15a-17a. For example, the amended Act now requires the Secretary to base any such decision on "controlling legal authority" or on specific evidence "clearly" demonstrating a statutory ground for declination; to approve any severable portion of a proposal; and to carry "the burden of

proof to establish by clearly demonstrating the validity of the grounds for declining." 25 U.S.C. § 450f(a)(2) & (4), (e)(1); App. 15a-17a. Moreover, if a Tribe's contract proposal is declined in whole or in part—or if, as had happened in the past, the Secretary purports to approve a request, but then does not take the steps necessary to implement the contract—the Tribe may bypass any administrative appeal and proceed straight to district court, seeking "immediate injunctive relief to reverse a declination finding ... or to compel the Secretary to award and fund an approved self-determination contract." 25 U.S.C. §§ 450f(b)(3) and 450*m*-1(a), as amended by the 1994 Amendments §§ 102(7) & 104(2), 108 Stat. 4252-4252, 4268; App. 17a, 25a.

Perhaps most strikingly, Congress denied the Secretaries the authority to promulgate the terms and conditions for ISDA contracts, and actually mandated a statutory form of contract. *See* 1994 Amendments § 103, 108 Stat. 4260-4268 (enacting ISDA § 108, codified as later further amended at 25 U.S.C. § 450*l*); App. 22a-24a; *see also* 1994 Rep. 3. In that prescribed form, it included at the outset a special rule of construction:

> Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the ... related functions, services, activities, and programs (or portions thereof) [listed in the Contract], that are otherwise contractable under section 102(a) of such Act [25 U.S.C. § 450f(a)], including all related administrative functions, from the Federal Government to the Contractor[.]

25 U.S.C. § 450*l*(c) (model contract § 1(a)(2)); App. 22a-23a. That rule was expressly intended to "incorporate[]

the longstanding canon of statutory interpretation that laws enacted for the benefit of Indians are to be liberally construed in their favor." 1994 Rep. 11.

Seeking to ensure that "there is no diminution in program resources when programs, services, functions, or activities are transferred to tribal operation," 1994 Rep. 9, Congress specifically addressed contract support costs both in the revised text of the Act and in the new prescribed form of contract. It amended the definition of "contract support costs" to include both indirect and direct program operation expenses. 1994 Amendments § 102(14), 108 Stat. 4257-4258 (amending ISDA § 106(a)(3), codified as amended at 25 U.S.C. § 450j-1(a)(3)); App. 18a-19a. It further prescribed, in the model contract, that "the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement .... Such amount shall be no less than the applicable amount determined pursuant to Section 106(a) [25 U.S.C. § 450j-1(a)]." 25 U.S.C. § 450*l*(c) (model contract § 1(b)(4)); *see also id.* (model contract § 1(b)(6)(B)(i)) ("the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement"); *id.* (model contract § 1(c)(2)) ("The total amount of funds to be paid under this Contract pursuant to section 106(a) ... shall be incorporated into this Contract."); App. 23a-24a. The statutory contract thus expressly incorporates contract support costs into funding agreements. *See* 1994 Rep. 11 ("Section 1(b)(3) of the model contract ... references the funding amounts provided in Section 106(a) of the Act [25 U.S.C. § 450j-1(a)]. That section provides that the Contractor shall receive no less than [the secretarial amount], plus funding for contract support cost needs.").

Correspondingly, Congress amended the Act to prescribe that "the Secretary *shall add* to the contract *the full amount* of funds to which the contractor is entitled under section 106(a) [25 U.S.C. § 450j-1(a)]," which includes support costs. 1994 Amendments § 102(17), 108 Stat. 4259 (amending ISDA § 106(g), codified as amended at 25 U.S.C. § 450j-1(g)); App. 19a. Like the statutory contract terms, this amendment replaced a system under which a Tribe had to *request* the addition of contract support costs to its contracts with provisions *mandating* that each tribal contractor have a contractual entitlement to the payment of such costs.

Finally, Congress expressly stripped the Secretaries of any authority to "promulgate any regulation, [or] impose any nonregulatory requirement, relating to self-determination contracts"—with the exception of one unified set of regulations that could address only specified topics, had to be vetted with Tribes through a "negotiated rulemaking" process, and had to be issued in final form within 18 months (later expanded to 20) after enactment of the 1994 Amendments. *See* 1994 Amendments § 105, 108 Stat. 4269-4270 (amending ISDA § 107, codified as later further amended at 25 U.S.C. § 450k); App. 20a-21a. The Senate Committee emphasized that, "[b]eyond the areas specified ..., no further delegated authority is conferred." 1994 Rep. 14.[8]

In short, in its 1988 and 1994 ISDA amendments, Congress progressively *eliminated* federal administra-

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[8] Congress's tight restriction of the Secretaries' regulatory authority in these respects is in keeping with its similar approach under separate titles of the ISDA. *See* 25 U.S.C. §§ 458ggg, 458aaa-16(e); *see also, e.g.*, H.R. Rep. No. 106-477, at 32 (1999) (discussing the "limited authority" given to the Secretary "to promulgate regulations implementing Title V").

tive discretion and *strengthened* the mandate that ISDA contracts both provide for the payment of full contract support costs and be enforceable in the same way as other government contracts.

II. THE GOVERNMENT'S POSITION CANNOT BE RECONCILED WITH THE HISTORY AND CONTEXT OF THE ISDA

A. Congress Reframed The ISDA Expressly To Ensure Each Contracting Tribe An Enforceable Right To Payment Of Full Contract Support Costs And To Eliminate Secretarial Discretion

In this case, the government essentially argues that a contracting Tribe has *no* enforceable right to payment of the full contract support costs specified in an ISDA contract. Instead, it contends, if Congress limits the appropriations available to the Interior Department to pay such costs to an amount that is not sufficient to pay all the costs incurred by all contracting Tribes, then the Secretary may effectively pick and choose, in his discretion, which Tribes will receive what amount of reimbursement. *See, e.g.*, Pet. Br. 36-43, 52-54. Three features of the ISDA's unique history are especially significant in evaluating that position.

First, the statute's evolution reflects an unmistakable congressional decision to treat ISDA contracts as binding promises. As this Court explained in *Cherokee Nation*, the ISDA "uses the word 'contract' 426 times to describe the nature of the Government's promise." 543 U.S. at 639. The "word 'contract,'" moreover, "normally refers to 'a promise or a set of promises for the breach of which the law gives a remedy.'" *Id.* (quoting *Restatement (Second) of Contracts* § 1 (1979)). Congress's choice of that term was deliberate: In 1988

it "considered deleting the term 'contract' and using another terms such as 'self-determination' grant," but instead "determined that the use of the term 'contract' was important to convey the sense of a legally binding instrument." 1988 Rep. 19. In making that choice, Congress was quite aware that it was also making the "strong remedies" of the Contract Disputes Act available to address breaches of ISDA agreements. *Id.* at 37. It consciously decided to "affor[d] self-determination contractors the procedural protections ... given other federal contractors." *Id.* at 36.

The government's position cannot be reconciled with that congressional decision. ISDA contracts create real obligations. Where a particular appropriation proves insufficient to satisfy all of the Secretary's obligations under such contracts, any Tribe that has not received payment has the ordinary recourse of enforcing those obligations against the United States under the Contract Disputes Act.

Second, the ISDA's evolution shows a consistent, extended congressional effort to require the full payment of contract support costs. Originally, the Act was silent with respect to contract support costs, effectively leaving the issue to administrative discretion. In 1988, Congress expressly addressed "the need to fully fund" contract support costs, 1988 Rep. 12, by requiring that they be added to ISDA contracts *on request* by a contracting Tribe. *See* 1988 Amendments, § 205; App. 11a. Finally, in 1994, faced with the Secretaries' persistent failure to implement these directives, Congress expressly prescribed full funding of contract support costs. It mandated use of a specific form of ISDA contract that requires including full contract support costs as part of the government's contractual obligation, *see* 25 U.S.C. § 450*l*(c) (model contract § 1(b)(4), (b)(6)(B)(i))

(App. 23a-24a); and for good measure it amended 25 U.S.C. § 450j-1(g) to require the Secretary to "add to the contract the full amount of funds to which the contractor is entitled under [§ 450j-1(a)]," which includes such costs (*see* App. 19a). This text and history refute the government's newly-minted theory that the promises in ISDA contracts are illusory. *See* Pet. Br. 36-38.

Third, Congress's successive amendments to the ISDA show a plain intent to eliminate federal administrative discretion, including with respect to the payment of contract support costs. As described in detail above, the history is one of uniform, progressive movement in that direction. Yet, the government argues here that if the overall amount Congress appropriates to the Secretary to pay support costs in a given year proves insufficient to fund all ISDA obligations, the ISDA leaves each contracting Tribe at the mercy of whatever system of distribution the Secretary may deem "equitable." *See, e.g.*, Pet. Br. 52; *compare* Resp. Br. 9-10 (describing range of payments of support costs, from nothing to well over 100%, made by Secretary to particular Tribes in actual practice); Arctic Slope Amicus Br. 3-7. Such an understanding of a government "contract" would be exceptionally odd in any context. Here, it is wholly untenable.

B. In The Context Of The ISDA, Any Doubt Must Be Resolved In Favor Of The Tribe

Finally, if the text and history of the ISDA left the matter in any doubt, any ambiguity in ISDA contracts, in the ISDA itself, or in related appropriation acts would have to be resolved in favor of each contracting Tribe.

When Congress lost patience with federal administrators and prescribed a statutory form for ISDA contracts in 1994, it expressly required each contract to state that both "[e]ach provision of the [Act] and each provision of this Contract shall be liberally construed for the benefit of the Contractor," to transfer the contracted federal functions and related funding to the contracting Tribe. 25 U.S.C. § 450*l*(c) (agreement § (1)(a)(2)); App. 22a-23a; *see also* 25 C.F.R. § 900.3(a)(5). Moreover, in prescribing that rule of statutory and contractual construction, Congress was consciously "incorporat[ing]," 1994 Rep. 11, the more general "principle deeply rooted in this Court's Indian jurisprudence" that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (internal quotation marks and alterations omitted); *see also, e.g.*, Cohen, *supra* n.2, § 2.02[3], at 124-125 (collecting cases). There could hardly be a more appropriate context for application of that principle than interpretation and application of the ISDA—as explained above, a cornerstone of modern federal Indian policy.

The government's self-serving construction of each ISDA contract and the ISDA itself treat tribal contractors under the ISDA worse than other government contractors and deny all or many of them payment for services concededly rendered under their contracts. It would allow the Secretary to decide, in his discretion, whether any given Tribe would receive all, some, or none of the contract support costs promised by its contract. In contrast, respondents' straightforward application of clear contractual and statutory language and conventional government contract principles would re-

quire the Secretary to pay each Tribe its full support costs, as agreed, to the extent of the funds available to him for that purpose in any given year, and leave any unpaid or underpaid Tribe with a claim for breach of contract and resulting damages under the Contract Disputes Act—precisely as contemplated by the amended ISDA, *see* 25 U.S.C. 450*m*-1(d); App. 13a. Respondents' position is correct without regard to any special rule of construction. If, however, there were any ambiguity on that score, then both the text of the ISDA and this Court's cases would require that it be resolved in favor of the contracting Tribes.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

STATUTORY PROVISIONS

Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203. (Codified as amended at 25 U.S.C. §§ 450 *et seq.*)

* * * *

DECLARATION OF POLICY

SEC. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

* * * *

CONTRACTS BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

SEC. 102. (a) The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter

into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 (48 Stat. 496), as amended by this Act, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto: *Provided, however*, That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further*, That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days, (2) provide to the extent practicable assistance to the tribe or tribal organization to overcome his stated objections, and (3) provide the tribe with a hearing, under such rules and regulations as he may promulgate, and the opportunity for appeal on the objections raised.

* * * *

ADMINISTRATIVE PROVISIONS

SEC. 106. (a) Contracts with tribal organizations pursuant to sections 102 and 103 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 24, 1935 (49 Stat. 793), as amended: *Provided*, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act.

* * * *

(h) The amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract: *Provided*, That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract.

PROMULGATION OF RULES AND REGULATIONS

SEC. 107. (a) The Secretaries of the Interior and of Health, Education, and Welfare are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title.

* * * *

REPORTS

SEC. 108. For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request.

* * * *

The ISDA as amended by the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285.

DECLARATION OF POLICY

[Section 102 of the 1988 Amendments, 102 Stat. 2285, amended ISDA Section 3(b). 25 U.S.C. § 450a (1988). The new language is shown in italics.]

SEC. 3 (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, *individual Indian tribes and to* the Indian people *as a whole* through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. *In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.*

* * * *

REPORTING AND AUDIT REQUIREMENTS

[Section 208 of the 1988 Amendments, 102 Stat. 2296, amended ISDA Section 108 and redesignated it as section 5(f). 25 U.S.C. § 450c(f) (1988). New language is shown in italics.]

SEC. 5. (f) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request *through regulations promulgated under sections 552 and 553 of title 5, United States Code.*

* * * *

SELF-DETERMINATION CONTRACTS

[Section 201 of the 1988 Amendments, 102 Stat. 2288, combined ISDA Sections 102 and 103 into a new Section 102, with substantial revisions. 25 U.S.C. § 450f (1988). Italics are used to emphasize particular new material.]

SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may

submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured; or

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing *on the record* and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate.

* * * *

CONTRACT FUNDING AND INDIRECT COSTS

[Section 205 of the 1988 Amendments, 102 Stat. 2292, added a new ISDA Section 106. 25 U.S.C. § 450j-1 (1988).]

SEC. 106. (a)(1) The amount of funds provided under the terms of self-determination, contracts entered into pursuant to this Act hall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3) Any savings in operation under a self-determination contract shall be utilized to provide additional services or benefits under the contract or be expended in the succeeding fiscal year as provided in section 8 of this Act.

(b) The amount of funds required by subsection (a)—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c).

Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

* * * *

(g) Upon the approval of a self-determination contract and at the request of an Indian tribe or tribal organization, the Secretary shall add the indirect cost funding amount awarded for a self-determination contract to the amount awarded for direct program funding for the first year and, subject to adjustments in the amount of direct program costs for the contract, for each subsequent year that the program remains continuously under contract.

(h) In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

PROMULGATION OF RULES AND REGULATIONS

[Section 207 of the 1988 Amendments, 102 Stat. 2295, amended ISDA Sections 107(a) and (b). 25 U.S.C. § 450k (1988). The new language is shown in italics.]

SEC. 107. (a) The Secretaries of the Interior and of *Health and Human Services* are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title: *Provided, however, That all Federal requirements for self-determination contracts and grants under this Act shall be promulgated as regulations in conformity with sections 552 and 553 of title 5, United States Code.*

* * * *

(b)(3) Within *seven* months from the date of enactment of *the Indian Self-Determination and Education Assistance Act Amendments of 1988*, the Secretary shall publish proposed regulations in the Federal Register for the purpose of receiving comments from tribes and other interested parties.

(4) Within ten months from the date of enactment of *the Indian Self-Determination and Education Assistance Act Amendments of 1988*, the Secretary shall promulgate regulations to implement the provisions of *such Act*.

CONTRACT APPEALS

[Section 206 of the 1988 Amendments, 102 Stat. 2294, added a new ISDA Section 110. 25 U.S.C. § 450m-1 (1988).]

SEC. 110 (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder.

(b) Unless otherwise agreed to by the resolution of an Indian tribe, the Secretary shall not revise or amend a self-determination contract with such tribe.

(c) The Equal Access to Justice Act (Public Law 96-481, Act of October 1, 1980; 94 Stat. 2325, as amended), shall apply to administrative appeals by tribal organizations regarding self-determination contracts.

(d) The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts.

* * * *

The ISDA as amended by the Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, Tit. I, 108 Stat. 4250.

REPORTING AND AUDIT REQUIREMENTS

[Section 102(2) of the 1994 Amendments, 108 Stat. 4250, amended ISDA Section 5(f) to read as follows. 25 U.S.C. § 450c (1994).]

SEC. 5. (f)(1) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract entered into, or grant made, under this Act, the tribal organization that requested such contract or grant shall submit to the appropriate Secretary a single-agency audit report required by chapter 75 of title 31, United States Code.

(2) In addition to submitting a single-agency audit report pursuant to paragraph (1), a tribal organization referred to in such paragraph shall submit such additional information concerning the conduct of the program, function, service, or activity carried out pursuant to the contract or grant that is the subject of the report as the tribal organization may negotiate with the Secretary.

(3) Any disagreement over reporting requirements shall be subject to the declination criteria and procedures set forth in section 102.

* * * *

SELF-DETERMINATION CONTRACTS

[Sections 102(5)-(7) and (9) of the 1994 Amendments, 108 Stat. 4251, amended ISDA Section 102 subsections (a), (b), and (e). 25 U.S.C. § 450f (1994). The new language is shown in italics.]

SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

* * * *

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, *or a proposal to amend or renew a self-determination contract,* to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless, *the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that,*

or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a); or

(E) the program function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

* * * *

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level under section 106(a),

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 106(a). If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

* * * *

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

* * * *

(3) provide the tribal organization with a hearing on the record *with the right to engage in full discovery relevant to any issue raised in the matter* and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, *except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 110(a).*

* * * *

(e)(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3), the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

* * * *

CONTRACT FUNDING AND INDIRECT COSTS

[Sections 102(14) and (17) of the 1994 Amendments, 108 Stat. 4257, amended ISDA Section 106 subsections (a) and (g) to read in part as follows. 25 U.S.C. § 450j-1 (1994). The new language is shown in italics.]

SEC. 106. (a)(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, *without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.*

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of *an amount for* the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under section 106(a).

* * * *

(g) Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106(a), subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * * *

PROMULGATION OF RULES AND REGULATIONS

[Section 105 of the 1994 Amendments, 108 Stat. 4269, amended ISDA Section 107 to read in part as follows. 25 U.S.C. § 450k (1994).]

SEC. 107. (a)(1) Except as may be specifically authorized in this subsection, or in any other provision of this Act, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this Act relating to chapter 171 of title 28, United States Code, commonly known as the 'Federal Tort Claims Act', the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103, property donation procedures arising under section 105(f), internal agency procedures relating to the implementation of this Act, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this Act, including the regulations referred to in this subsection, shall be promulgated—

(i) in conformance with sections 552 and 553 of title 5, United States Code and subsections (c), (d), and (e) of this section; and

terly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

* * * *

(c)(2) Amount of funds.—The total amount of funds to be paid under this Contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

* * * *

CONTRACT APPEALS

[Section 104(2) of the 1994 Amendments, 108 Stat. 4268, amended ISDA Section 110(a) to read as follows. 25 U.S.C. § 450m-1 (1994). The new language is shown in italics.]

SEC. 110. (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder *(including immediate injunctive relief to reverse a declination finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract)*.

* * * *

CONTRACT SPECIFICATIONS

[Section 103 of the 1994 Amendments, 108 Stat. 4260, adding a new ISDA Section 108. 25 U.S.C. § 450l (1994).]

SEC. 108. (a) Each self-determination contract entered into under this Act shall—

(1) contain such, or incorporate by reference, the provisions of the model agreement described in subsection (c) (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

(b) Notwithstanding any other provision of law, the Secretary may make payments pursuant to section 1(b)(6) of such model agreement. As provided in section 1(b)(7) of the model agreement, the records of the tribal government or tribal organization specified in such section shall not be considered Federal records for purposed of chapter 5 of title 5, United States Code.

(c) The model agreement referred to in subsection (a)(1) reads as follows:

Section 1. Agreement Between The Secretary and The Tribal Government.

* * * *

(a)(2) Purpose.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative

functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

* * * *

(b)(4) Funding amount.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

* * * *

(6) Payment.—

(A) In general.—Payments to the Contractor under this Contract shall—

(i) be made as expeditiously as practicable; and

(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

(B) Quarterly, semiannual, lump-sum, and other methods of payment.—

(i) In general.—Pursuant to 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quar-

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this Act shall expire if final regulations are not promulgated within 18 months after the date of enactment of the Indian Self-Determination Contract Reform Act of 1994.

* * * *